No. 04-1170

Title: Kansas, Petitioner
v.
Michael Lee Marsh, II

Docketed: March 3, 2005
Lower Ct: Supreme Court of Kansas
Case Nos.: (81,135)
Decision Date: December 17, 2004

**Questions Presented**

| ~~Date~~ | ~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Mar 2 2005 | Petition for a writ of certiorari filed. (Response due April 4, 2005) |
| Apr 4 2005 | Brief amicus curiae of Criminal Justice Legal Foundation filed. |
| Apr 4 2005 | Brief of respondent Michael Lee Marsh, II in opposition filed. |
| Apr 4 2005 | Motion for leave to proceed in forma pauperis filed by respondent. |
| Apr 13 2005 | Reply of petitioner Kansas filed. |
| Apr 19 2005 | DISTRIBUTED for Conference of May 12, 2005. |
| May 16 2005 | DISTRIBUTED for Conference of May 19, 2005. |
| May 23 2005 | DISTRIBUTED for Conference of May 26, 2005. |
| May 31 2005 | Motion for leave to proceed in forma pauperis filed by respondent GRANTED. |
| May 31 2005 | Petition GRANTED. In addition to the Question presented by the petition, the parties are directed to brief and argue the following Questions: "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. Sec. 1257, as construed by Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975)?"; "Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?" |
| Jun 9 2005 | Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including August 15, 2005. |
| Jul 15 2005 | Joint appendix filed. |
| Jul 25 2005 | SET FOR ARGUMENT on December 7, 2005. |
| Aug 5 2005 | CIRCULATED. |
| Aug 15 2005 | Brief of petitioner Kansas filed. |
| Aug 15 2005 | Brief amici curiae of Arizona, et al. filed. (Distributed) |
| Aug 15 2005 | Brief amicus curiae of Criminal Justice Legal Foundation filed. (Distributed) |
| Sep 15 2005 | Extension of time within which to file respondent's brief on the merits to and including October 19, 2005. |
| Oct 19 2005 | Brief amici curiae of Kansas Law Professors filed. (Distributed) |
| Oct 19 2005 | Brief of respondent Michael Lee Marsh, II filed. (Distributed) |

| | |
|---|---|
| Nov 14 2005 | Record received from Supreme Court of Kansas. (5 boxes and 1 oversized exhibit) |
| Nov 23 2005 | Reply of petitioner Kansas filed. (Distributed) |
| Dec 7 2005 | Argued. For petitioner: Phill Kline, Attorney General, Topeka, Kan. For respondent: Rebecca E. Woodman, Topeka, Kan. |

Supreme Court, U.S.
FILED
041170 MAR 2 - 2005
OFFICE OF THE CLERK

No. 04-

IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

v.

MICHAEL LEE MARSH II,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas**

## PETITION FOR A WRIT OF CERTIORARI

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**CAPITAL CASE**

**QUESTION PRESENTED**

Does it violate the Constitution for a state capital-sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

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## PETITION FOR A WRIT OF CERTIORARI

The Attorney General of the State of Kansas respectfully petitions for a writ of certiorari to review the judgment of the Kansas Supreme Court.

## OPINION BELOW

The opinion of the Kansas Supreme Court (App., *infra*, 1a-77a ) is reported at 102 P.3d 445 (Kan. 2004).

## JURISDICTION

The opinion of the Kansas Supreme Court (App., *infra*, 1a-77a) was delivered on December 17, 2004. Petitioner's Motion for Rehearing was denied on February 2, 2005. App., *infra*, 78a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides in relevant part that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law."

Kan. Stat. Ann. § 21-4624(e) provides in relevant part that "[i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [Kan. Stat. Ann. §] 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

## STATEMENT OF THE CASE

1. Respondent, Michael Lee Marsh II, was convicted by a jury in Sedgwick County, Kansas, of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. App., *infra,* 9a. He was sentenced to death for capital murder, to a term of life imprisonment with no possibility for parole for 40 years for first-degree murder, and consecutive sentences of 51 months for aggravated arson, and 34 months for aggravated burglary. *Id.* at 9a-10a.

The convictions stem from the 1996 deaths of Marry Ane Pusch and her nineteen-month-old daughter, M.P. On the evening of June 17, 1996, respondent broke into the Pusch home and waited in a closet for Marry Ane to return home. Shortly after Marry Ane and M.P. entered the house, respondent came out of the closet, shot Marry Ane multiple times, stabbed her, and slashed her throat. The house was then set on fire, and the toddler, M.P., was left to burn to death.[1] *Id.* at 7a-8a.

2. In a 4-3 decision on respondent's direct appeal, the lower court held the Kansas death penalty statute, Kan. Stat. Ann. § 21-4624(e), unconstitutional on its face. The majority concluded that the weighing equation used to determine whether the death penalty was appropriate in a given case violated the Eighth and Fourteenth Amendments to the United States Constitution because it provided that a capital defendant "shall be sentenced to death," if the jury determines that the aggravating circumstances are "not outweighed by any mitigating circumstances." App., *infra,*

[1] Below, petitioner maintained that respondent set the house on fire and left M.P. to burn to death, and the jury convicted respondent for those acts. However, while finding sufficient evidence to support all of respondent's convictions, the lower court reversed his convictions for capital murder (which was based on M.P.'s death) and aggravated arson and remanded for a new trial on the grounds that certain defense evidence was improperly excluded under state law. App. *infra,* 11a-17a.



17a-31a. The majority found that this effectively directed the imposition of the death penalty if the jury determined the aggravating and mitigating circumstances weighed equal, and that such a circumstance is repugnant to the United States Constitution. *Id.* at 19a-20a.

The rationale used by the majority in making this constitutional determination is found in an earlier Kansas case, *State v. Kleypas*, 40 P.3d 139, 223-32 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002).[2] In *Kleypas,* the lower court held that the weighing equation failed to comport with this Court's Eighth Amendment jurisprudence because "it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstance it finds exist." App., *infra*, 114a. In arriving at this conclusion, the lower court relied primarily on *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987), *People v. Young*, 814 P.2d 834 (Colo. 1991), and *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993) to reject the argument that this Court approved such a weighing equation in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). *Id.* at 98a-115a.

Rather than invalidating the entire death penalty statute however, the *Kleypas* court simply mandated that it could not be applied in a manner in which the death penalty could be imposed when the aggravators and mitigators were in equipoise, and directed that sentencing juries be instructed that in order to impose the death penalty, the aggravators must outweigh the mitigators. *Id.* at 115a-119a. In the instant case, the lower court reversed that portion of the *Kleypas* decision, but affirmed its conclusion that the weighing equation is unconstitutional. App., *infra*, 18a-31a. Significantly, the majority in the present case emphasized that "a majority of the United States Supreme Court has never squarely addressed or decided the facial

[2] The relevant portions of the lower court's decision in *Kleypas* have been provided in the Appendix. *See* App. 79a-142a.

constitutionality of the equipoise provision before us." *Id.* at 21a.

3. The majority's decision drew vigorous dissents from the remaining three justices. *Id.* at 35a-53a (Davis, J., dissenting); 54a-69a (Nuss, J., dissenting); 69a-77a (McFarland, C.J., dissenting). All three justices agreed that Kansas' death penalty provision was constitutional as written and found the majority's interpretation of the Constitution and this Court's precedent to be seriously flawed. *Id.* These dissenting justices noted that this Court in *Walton v. Arizona*, *supra* considered and found constitutional a death penalty statute that was effectively the same as the Kansas statute at issue. *Id.* at 45a-48a (Davis, J., dissenting); 54a-64a (Nuss, J., dissenting). The dissents pointed out that this Court in *Walton* rejected the very rationale used by the majority. *Id.* The dissents further observed that subsequent cases from the Ninth Circuit and the supreme courts of Arizona and Idaho interpreted *Walton* as being dispositive of this issue. *Id.* at 48a-50a (Davis, J., dissenting); 64a-69a (Nuss, J., dissenting).

## REASONS FOR GRANTING THE WRIT

The decision below invalidating Kansas' death penalty statute as violating the Eighth Amendment to the United States Constitution resurrects a conflict in constitutional interpretation that this Court resolved in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds*, *Ring v. Arizona*, 536 U.S. 584 (2002). The decision below directly conflicts with this Court's decision in *Walton*, as well as subsequent decisions of the supreme courts of Arizona and Idaho, and the Ninth Circuit. If allowed to stand, the decision below will reawaken death penalty issues and arguments that this Court laid to rest in *Walton*. For these reasons, certiorari – or even summary reversal – is warranted.



### I. The Kansas Supreme Court's Decision Conflicts With This Court's Decision in *Walton v. Arizona*.

In *Walton*, this Court upheld Arizona's capital-sentencing statute against a variety of challenges, one of which was identical to the challenge asserted by respondent in this case. The Court granted certiorari to resolve a conflict between the Arizona Supreme Court and the Ninth Circuit. *Walton*, 497 U.S. at 647. In a series of decisions, the Arizona Supreme Court had interpreted its capital-sentencing statute as requiring capital defendants to demonstrate that the mitigating circumstances outweighed the aggravating circumstances and had found the statute, so construed, to be constitutional. *State v. Gretzler*, 659 P.2d 1 (Ariz. 1983) (citing *State v. Knapp*, 562 P.2d 704 (Ariz. 1977); *State v. Ortiz*, 639 P.2d 1020 (Ariz. 1981); *State v. Bishop*, 622 P.2d 478 (Ariz. 1981); *State v. Clark*, 616 P.2d 888 (Ariz. 1980)). By contrast, in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (*en banc*), the Ninth Circuit held that the Arizona statute was unconstitutional because, among other reasons, it provided for the imposition of the death penalty if the defendant failed to establish that mitigating circumstances outweighed any aggravating circumstances. The Ninth Circuit, as the lower court did here, found the statute fatally flawed "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death." *Id.* at 1043. Consequently, the Ninth Circuit (again like the lower court here) concluded that such a statutory construction created an unconstitutional presumption in favor of the death penalty. *Id.* at 1044.

Ultimately, this Court affirmed the Arizona Supreme Court and rejected the Ninth Circuit's conclusion that the Arizona statute was unconstitutional. Of particular relevance here, the Court (in Part IV of its opinion) rejected Walton's claim that, "because [the Arizona statute] provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating

circumstances are insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." 497 U.S. at 651. The Court relied on its decision in *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990), which stated that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing a jury to consider all relevant mitigating evidence." *Walton*, 497 U.S. at 652. The Court also pointed to its decision in *Boyde v. California*, 494 U.S. 370, 377 (1990), which stated that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Walton*, 497 U.S. at 652. The Court concluded that "Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*." *Id.*[3]

The lower court nevertheless concluded that "a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us." App., *infra*, 21a. Noting that the Arizona statute at issue in *Walton* was worded differently than the Kansas statute, and that this Court's decision in *Walton* did not mention "equipoise" or refer to situations in which aggravators and mitigators were in balance, the lower court determined that this issue was not decided by the *Walton* Court. App., *infra*, 18a-21a (*Marsh* decision); 102a-105a (*Kleypas* decision). That conclusion is manifestly wrong.

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[3] Justice White was writing for four Justices rather than the Court only because Justice Scalia, who concurred in the judgment on these issues, would have held "that when a State adopts capital punishment for a given crime but does not make it mandatory, the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients." *Walton*, 497 U.S. at 671 (Scalia, J., concurring in part and concurring in the judgment); *Campbell v. Wood*, 18 F.3d 662, 675 n.5 (9th Cir. 1994) (discussing the Justices' votes in *Walton*).



To be sure, the wording in Arizona's law is (and was) different from the wording in Kansas' law. The Arizona statute at issue in *Walton* provided that the court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Ariz. Rev. Stat. Ann. §13-703(E) (1989), *quoted in Walton*, 497 U.S. at 644. As the *Walton* dissent pointed out, however, the "Arizona Supreme Court repeatedly ha[d] indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation." *Id.* at 687 (Blackmun J., dissenting). Thus, the Arizona capital sentencing statute at issue in *Walton* operated, as relevant here, in *precisely* the same manner as Kansas' statute.

It is also true that the *Walton* Court did not use the term "equipoise." There can be no doubt, though, that Walton argued the "equipoise" issue and that the Court rejected that argument in Part IV of its opinion. Walton asserted in his brief that:

> While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. *This is because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death.* Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence. . . . *Adamson v. Ricketts*, *supra*, 865 F.2d at 1043 (footnotes omitted).

Brief of Petitioner, *Walton v. Arizona*, No. 88-7351, at 37 (emphasis added), *quoted in* App., *infra*, 57a (Nuss, J., dissenting)). It was squarely that argument which the Court addressed in Part IV, as the *Walton* dissent unhesitatingly acknowledged. 497 U.S. at 687-88 (Blackmun, J., dissenting).

Finally, reading the *Walton* decision as the lower court did is nonsensical in terms of what this Court sought to accomplish. This Court stated: "Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, . . . we granted certiorari to resolve the conflict . . . ." 497 U.S. at 647 (internal citations omitted). If the Court did not reject the Ninth Circuit's holding that the Arizona capital sentencing statute is unconstitutional "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death," *Ricketts*, 865 F.3d at 1043, then the conflict remained unresolved. But that was not the outcome of *Walton*. Rather, this Court rejected the argument that this created an unconstitutional presumption in favor of death, and upheld Arizona's death penalty statute as interpreted by the Arizona Supreme Court.

## II. The Kansas Supreme Court's Decision Resurrects a Lower Court Conflict That *Walton* Had Put to Rest.

Following *Walton*, the Ninth Circuit itself recognized that no unconstitutional presumption existed in Arizona's capital-sentencing equation and that the equipoise issue had been laid to rest. *See Richmond v. Lewis*, 948 F.2d 1473, 1481-82 (9th Cir. 1992), *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), and *Campbell v. Wood*, 18 F.3d 662, 675 (9th Cir. 1994). Likewise, the Arizona Supreme Court understood *Walton* to validate the constitutionality of its interpretation and application of the Arizona death penalty statute. *State v. Brewer*, 826 P.2d 783, 794 (Ariz. 1992); *State v. Greenway*, 823 P.2d 22, 27 (Ariz. 1991). Since *Walton*, the Arizona Supreme Court has consistently reiterated that under Arizona law, the death penalty shall be imposed when the mitigating circumstances fail to outweigh the aggravating circumstances, and has repeatedly rejected arguments that this creates an unconstitutional presumption in favor of death. *State v. Pandeli*, 26 P.3d 1136, 1152



(Ariz. 2001); *State v. Hoskins*, 14 P.3d 997, 1016 (Ariz. 2000); *State v. Djerf*, 959 P.2d 1274, 1286 (Ariz. 1998); *State v. Thornton*, 929 P.2d 676, 686 (Ariz. 1996); *State v. Gulbrandson*, 906 P.2d 579, 605 (Ariz. 1995).

Further, the Idaho Supreme Court echoed *Walton's* holding in *State v. Hoffman*, 851 P.2d 934 (Idaho 1993). In that case, the defendant challenged the Idaho death penalty on exactly the same grounds as the respondent in the present matter challenged the Kansas death penalty: that it was unconstitutional because it required a capital defendant to establish mitigating circumstances that outweighed the aggravating circumstances. 851 P.2d at 942-43. The Idaho Supreme Court rejected that argument on the grounds that this Court had found such a statutory scheme to be constitutional in *Walton*. *Id.* at 943.

Finally, in a case not based on *Walton* but expressing similar rationale and decided almost contemporaneously with *Walton*, the Seventh Circuit rejected a similar argument that Illinois' death penalty statute created an unconstitutional presumption in favor of the death penalty. *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990). The statute at issue in *Silagy*, similar to that in *Walton*, provided that the death penalty would be imposed in a capital case if the jury determined there were no mitigating factors "sufficient to preclude the imposition of the death sentence." *Id.* at 998. There, petitioner argued that this impermissibly shifted upon him the burden of proving that death should not be imposed. However, the Seventh Circuit disagreed and found no constitutional infirmity. *Id.* at 998-99. Taking note of both *Walton* and *Silagy*, the Illinois Supreme Court subsequently rejected a similar claim that the Illinois death penalty statute created an unconstitutional presumption of death. *People v. Mitchell*, 604 N.E.2d 877, 912 (Ill. 1992).

In spite of this Court's decision in *Walton*, and the decisions of the Seventh Circuit, Ninth Circuit, and the supreme courts of Arizona, Idaho, and Illinois, rejecting

same or similar arguments as raised in the instant case, the lower court held that the death penalty statute in Kansas violated the United States Constitution. The lower court supported its position with the decisions of the New Jersey Supreme Court in *State v. Biegenwald*, 524 A.2d 130 (N.J. 1987), the Colorado Supreme Court in *People v. Young*, 814 P.2d 834 (Colo. 1991), and the United States District Court for the Eastern District of Arkansas in *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993). These decisions, however, predated *Walton*, relied primarily on state law, and/or involved highly questionable interpretations of *Walton*. *See, e.g., Young*, 814 P.2d at 845 ("The United States Supreme Court has not addressed the constitutionality of a mandatory death penalty when the jury concludes that aggravating and mitigating factors are equally balanced."). Nevertheless, they reflect a trend in thought that conflicts with this Court's reasoning established in *Walton*.

Simply put, this case involves more than an erroneous interpretation of this Court's precedent by a state court of last resort, resulting in the invalidation of a state's death penalty law (a significant issue in itself). It involves a clear conflict of constitutional interpretation, among both state supreme courts and federal courts that must be resolved.

### III. The Constitutionality of Kansas' Death Penalty Statute, and Similar Statutes in Other States, Is an Important Issue That Merits This Court's Attention.

Although the lower court's determination that *Walton* did not settle this issue, and its subsequent interpretation of the United States Constitution are not binding on any other courts beyond Kansas, its decision in this matter, if left unreviewed, will provide persuasive authority for others to revive this issue and pursue constitutional challenges that this Court put to rest in *Walton*. If allowed to stand, this decision by the lower court will undermine the decisions of the Arizona and Idaho supreme courts, as well as the decisions of the Seventh and Ninth Circuits. In spite of this



Court's ruling in *Walton*, the decision below will support credible arguments that earlier interpretations of *Walton* were erroneous, and that *Walton* did not decide this issue.

This Court granted certiorari in *Walton* "to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty." 497 U.S. at 647. The decision of the lower court revives that conflict and unsettles one of the issues this Court resolved in *Walton*. This re-emergence of a split in constitutional interpretation regarding capital sentencing presents a compelling reason for once again granting review to "resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty." *Id.*

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 2005

# APPENDIX

[Filed Dec. 17, 2004]

**IN THE SUPREME COURT OF THE STATE OF KANSAS**

**No. 81,135**

**STATE OF KANSAS,**

**Appellee,**

**v.**

**MICHAEL LEE MARSH II,**

**Appellant.**

**SYLLABUS BY THE COURT**

1. The standard of review on a sufficiency of the evidence claim in a criminal appeal is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, we are persuaded that a rational factfinder could have found the defendant guilty beyond a reasonable doubt.

2. A conviction of even the gravest offense may be sustained by circumstantial evidence. It is the function of a jury and not an appellate court to weigh evidence and pass on the credibility of witnesses.

3. The evidence in this case was sufficient to establish that the defendant set the fire in issue, that one of the victim's burns was the proximate cause of her death, and that defendant acted intentionally and with premeditation in killing the other victim.

4. The purpose of a motion in limine is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel.

5. A party whose evidence is excluded by a motion in limine has the responsibility of proffering sufficient evidence to preserve the issue on appeal.

6. No error in either the admission or the exclusion of evidence is a ground for new trial or for setting aside a

verdict unless refusal to take such action appears to be inconsistent with substantial justice. An appellate court must disregard any error or defect in a proceeding that does not affect the substantial rights of the parties.

7. Errors in violation of a constitutional right of a party are governed by the federal constitutional error rule. Under that rule, an error of constitutional magnitude may not be found harmless unless an appellate court is willing to declare a belief beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial.

8. Under the Kansas and federal Constitutions a criminal defendant is entitled to present the theory of his or her defense. Exclusion of evidence that is an integral part of the theory violates the defendant's fundamental right to a fair trial.

9. Few rights are more fundamental than that of an accused to present witnesses in his or her defense. The right to present a defense is, however, subject to statutory rules and case law interpretation of rules of evidence and procedure.

10. The general rule is that, unless otherwise provided by statute, constitutional prohibition, or court decision, all relevant evidence is admissible. Relevant evidence is evidence having any tendency in reason to prove any material fact.

11. To establish relevance, a party must show there is some material or logical connection between the asserted facts and the inference or result they are designed to establish.

12. The probative values of direct and circumstantial evidence are intrinsically similar, and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each.

13. Proper application of Kansas' third-party evidence rule is limited. Although evidence of a third party's motive to commit a crime, standing alone, is not relevant, such evidence may be relevant if there is other evidence



connecting the third party to the crime. Furthermore, circumstantial evidence connecting a third party to a crime must not be excluded merely because the State relies upon direct evidence of a defendant's guilt. There is no bright line rule. Instead, the decision whether to admit third-party evidence is entrusted to the sound discretion of the district court, after evaluation of the totality of facts and circumstances in a given case under the relevance standard set forth in K.S.A. 60-407(f). To the extent earlier Kansas decisions suggest that the third-party evidence rule should be applied more broadly, they are disapproved.

14. On the record in this case, the district court's failure to engage in an evaluation of the totality of facts and circumstances under the relevance standard set forth in K.S.A. 60-407(f) in order to determine whether the defendant's third-party evidence was admissible was reversible error.

15. A party, through testimony, may open the door for otherwise inadmissible evidence.

16. The admission of circumstantial evidence of a third person's culpability is constitutionally required when the third person testifies against the defendant. A defendant's constitutional right of confrontation is violated when he or she is prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias, a need to deflect suspicion, on the part of the third party.

17. On the record in this case, the district court committed reversible error by refusing to admit the defendant's third-party evidence after the third party testified against the defendant.

18. It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a

statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.

19. Kansas courts may apply the avoidance doctrine in appropriate cases. The doctrine is characterized by application of two canons of statutory interpretation. First, the constitutionality of a statute is presumed. All doubts must be resolved in favor of its validity, and, before the statute may be stricken down, it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it. If there is any reasonable way for the court to construe the statute as constitutionally valid, it should do so. Statutes are not stricken down unless the infringement of the superior law is clear beyond a reasonable doubt. Second, a statute apparently void on its face may be constitutional when limited and construed to read the necessary requirements into it. This may be done, for example, when such an interpretation will carry out the intent of the legislature.

20. The avoidance doctrine seeks in part to minimize disagreement between the legislative and judicial branches of government by preserving enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating, through the power of precedent, statutes foreign to those the legislature intended. Those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held unconstitutional. In addition, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a fair one.



21. The courts' power to employ the avoidance doctrine to construe away a statute's constitutional infirmity is limited. The judiciary may not rewrite language enacted by the legislature. Rather, the doctrine applies only when a statute is ambiguous, vague, or overbroad.

22. It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law generally will be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved.

23. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law. However, courts of last resort are not inexorably bound by their own precedents. They will follow the rule of law established in earlier cases unless clearly convinced that the rule was originally erroneous or is no longer sound.

24. Stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision. It is designed to protect well-settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true when the rule in question was adopted *sua sponte* and is young and previously untested.

25. K.S.A. 21-4624(e) is unambiguous. Its express language was clearly intended to mandate the imposition of a death sentence when the existence of aggravating circumstances was not outweighed by any mitigating circumstances. The legislature chose this language over alternative wording recommended by the attorney general to avoid constitutional infirmity. As a result, the statute is unconstitutional on its face under the Eighth and Fourteenth Amendments.

26. The avoidance doctrine cannot be appropriately applied to save K.S.A. 21-4624(e). Any holding to the contrary in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), is overruled.

27. On the record of this case, the evidence was sufficient to support a finding that aggravating circumstances in support of imposition of a hard 40 sentence were not outweighed by mitigating circumstances.

28. There are three exceptions to the rule that issues must have been raised in the district court before they will be addressed on appeal: (1) The newly asserted claim involves only a question of law arising on proved or admitted facts and is determinative of the case; (2) consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) the district court was right for the wrong reason.

29. Kansas' hard 40 sentencing scheme as set forth in K.S.A. 2003 Supp. 21-4635(a) does not increase the statutory maximum punishment; it sets a minimum punishment. As such, it is not unconstitutional as a violation of the holding in *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

Appeal from Sedgwick district court, CLARK V. OWENS II, judge. Opinion filed December 17, 2004. Affirmed in part, reversed in part, and remanded with directions.

*Rebecca E. Woodman* and *Steven R. Zinn*, capital appellate defenders, argued the cause and were on the briefs for appellant.

*John K. Bork*, assistant attorney general, argued the cause, and *Kristafer Ailslieger*, *Jared Maag*, and *Elizabeth Reimer*, assistant attorneys general, and *Carla J. Stovall*, attorney general, were on the brief for appellee.

The opinion of the court was delivered by

ALLEGRUCCI, LUCKERT, GERNON, and BEIER, JJ.: This is an appeal by the defendant, Michael L. Marsh II,



from convictions of capital murder of Marry Elizabeth Pusch (M.P.), first-degree premeditated murder of Marry Ane Pusch (Marry), aggravated arson, and aggravated burglary. Marsh has been sentenced to death for the capital offense, life imprisonment with a mandatory minimum term of 40 years for the murder of Marry, 51 months for aggravated arson, and 34 months for aggravated burglary. The district court ordered the last three sentences to be served consecutively.

On appeal, Marsh raises 18 issues arising from the guilt phase of the trial and 16 issues from the penalty phase. We begin by observing that there is a heightened scrutiny of trial proceedings in a capital case. *Beck v. Alabama*, 447 U.S. 625, 637-38, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980). However, because we conclude K.S.A. 21-4624(e) is unconstitutional on its face, precluding application of the death penalty, we will not apply a heightened scrutiny standard of review to the remaining issues on appeal.

We deem the following issues to be controlling: (1) Is there substantial competent evidence to support each of Marsh's convictions? (2) Was evidence improperly excluded by the district court? (3) Is K.S.A. 21-4624(e) unconstitutional on its face? (4) Is there substantial competent evidence to support imposition of a hard 40 sentence for the premeditated murder of Marry? and, (5) Is the hard 40 sentencing scheme set forth in K.S.A. 2003 Supp. 21-4635(a) unconstitutional?

## FACTS

On the evening of June 17, 1996, Marry and her 19-month-old daughter, M.P., were murdered in their Wichita home. Marry died as a result of multiple gunshot wounds to her head and a knife wound to her heart. The perpetrator or perpetrators apparently did not physically harm M.P before setting the house afire and leaving the child to die in the ensuing conflagration. M.P. sustained severe burns to her

body, resulting in multiple organ failure and death on June 23, 1996.

Fire investigators determined the fire was intentionally started with an accelerant applied to Marry's body. An autopsy revealed Marry had been shot 3 times, stabbed in the heart, and her throat slashed. The county coroner concluded Marry had died as a result of her wounds, with her body set afire after death.

In the initial stages of investigation, detectives interviewed Marry's husband, Eric Pusch (Pusch), who mentioned having spent most of June 17 with a friend, Michael Marsh, before going to work at approximately 4:30 p.m. as a delivery man for a local Pizza Hut. This led the police to interview Marsh.

A series of interviews with Marsh resulted in his confession to shooting Marry and abandoning M.P. when he fled the residence. He told the detectives his motive was to obtain money from the Pusch family. According to Marsh, he planned to be in the home when Marry and M.P. arrived, tie them up, and wait until Pusch got home. He would then threaten Pusch with harm to his wife and child to obtain the money needed for a trip to Alaska. Marsh indicated his plan went awry when Marry and M.P. arrived at the house earlier than he had anticipated; he panicked and shot Marry. Initially, he told detectives he could not recall how many times he pulled the trigger; subsequently, he indicated firing the gun once. Marsh was equivocal regarding the fire. At one point he indicated he probably did set the fire; at another point he stated he could not remember; and, finally, he denied setting the fire. Marsh denied Pusch was in any way involved in committing the crimes.

There was substantial evidence corroborating Marsh's confession. Marsh lived with his grandparents. Keys to the Pusch home were found discarded in a yard next to the grandparents' home. Among the items recovered during execution of a search warrant at the grandparents' residence were a .25 caliber pistol with five cartridges in the magazine,



Marsh's bloodstained tennis shoes, a pillow with bullet holes in it wrapped in duct tape, and a water bottle with duct tape around its neck. Expert testimony at trial established the pillow and bottle could be used as a makeshift silencer.

Both Marry's and M.P.'s clothing tested positive for medium petroleum vapors consistent with lighter fluid. However, Marsh's clothing and shoes tested negative for vapors. Marry's blood was found on one of Marsh's tennis shoes; inexplicably, so also was the blood of Pusch.

Prior to trial, the State filed a motion in limine to prevent Marsh from introducing circumstantial evidence suggesting that Pusch stabbed Marry and set the fire killing M.P. The State contended that Kansas law would prevent admission of circumstantial evidence tending to implicate Pusch in the face of direct evidence Marsh killed Marry and set the fire. Marsh's trial counsel argued there was substantial evidence linking Pusch to the crimes and proffered the evidence the defendant sought to introduce at trial. The district court granted the State's motion in limine, reasoning that the State's evidence against Marsh was direct and thus the defense could not present the proffered circumstantial evidence to implicate Pusch.

The jury found Marsh guilty of capital murder of M.P., first-degree murder of Marry, aggravated arson, and aggravated burglary. At the penalty phase of the trial, the State relied upon the following statutory aggravating factors to support a death sentence: (1) Marsh knowingly or purposely killed or created a great risk of death to more than one person; (2) he committed the crime in order to avoid or prevent a lawful arrest or prosecution; and (3) he committed the crime in an especially heinous, atrocious or cruel manner. See K.S.A. 21-4625. The jury found all three aggravating circumstances existed and were not outweighed by any mitigating circumstances and unanimously agreed to a sentence of death.

At sentencing, the trial judge found sufficient evidence to support the sentence of death recommended by the jury. See K.S.A. 21-4624(f). The trial judge also found the same three aggravating circumstances were not outweighed by mitigating circumstances to support imposition of a hard-40 sentence. See K.S.A. 2003 Supp. 21-4638. Marsh also was sentenced to 51 months for aggravated arson and 34 months for aggravated burglary, with all sentences to be served consecutively.

## SUFFICIENCY OF THE EVIDENCE

The issue on appeal is limited to whether the evidence was sufficient to support the jury's verdict finding Marsh guilty of capital murder. Marsh contends the evidence was insufficient to establish that: (1) he set the fire; (2) M.P.'s burns were the proximate cause of her death; or (3) he intentionally killed M.P. with premeditation. When a sufficiency of the evidence issue is raised, our standard of review is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the defendant guilty beyond a reasonable doubt. *State v. Zabrinas*, 271 Kan. 422, 441-42, 24 P.3d 77 (2001).

Marsh confessed to the crime of aggravated burglary. He admitted hiding in the Pusch home and shooting Marry in the head when she came into the bedroom. The .25 caliber pistol used to shoot Marry was subsequently found in Marsh's backpack at his grandparents' home. He admitted to attempting to start a fire with matches to conceal his crimes but claimed this was unsuccessful. Nonetheless, we know from the uncontroverted evidence there was a fire that caused burns to more than 75 percent of M.P.'s body. Although there is no direct evidence Marsh set the fire, the circumstantial evidence is sufficient for a rational factfinder to conclude beyond a reasonable doubt that he did so and that he abandoned M.P. to die in the fire.



Marsh also argues the evidence was insufficient to establish M.P.'s burns were the proximate cause of her death. This argument must fail. Both the treating physician and the medical coroner testified M.P.'s cause of death resulted from the extensive burns to her body and the related failure of internal organs. Conversely, both doctors concluded the drugs given to M.P. at the hospital did not cause her death.

A conviction of even the gravest offense may be sustained by circumstantial evidence, *State v. Penn*, 271 Kan. 561, 564, 23 P.3d 889 (2001), and it is the function of a jury and not an appellate court to weigh evidence and pass on the credibility of witnesses. *State v. Moore*, 269 Kan. 27, 30, 4 P.3d 1141 (2000). After considering all of the evidence presented to the jury for its consideration upon this issue, we conclude Marsh's sufficiency of the evidence arguments must fail.

## THE EXCLUSION OF MARSH'S EVIDENCE

Marsh contends the district court erred in excluding evidence connecting Pusch to the crimes. Marsh argues the court's pretrial order in limine excluding the evidence was erroneous for two reasons: First, the Kansas third-party evidence rule only excludes motive evidence in the absence of other relevant evidence, circumstantial or direct, to connect a third party to the crime; and second, after Pusch testified as a witness for the State, the "door was opened" and the order in limine should have been disregarded.

"'The purpose of a motion in limine is to assure all parties a fair and impartial trial by prohibiting inadmissible evidence, prejudicial statements, and improper questions by counsel.'" *State v. Abu-Fakher*, 274 Kan. 584, 594, 56 P.3d 166 (2002) (quoting *Brunett v. Albrecht*, 248 Kan. 634, 638, 810 P.2d 276 [1991]). A party whose evidence is excluded by a motion in limine has the responsibility of proffering sufficient evidence to preserve the issue on appeal. *State v. Evans*, 275 Kan. 95, 99, 62 P.3d 220 (2003). We observe the State does not challenge the sufficiency of Marsh's proffer to

the district court. We conclude the issue has been properly preserved for appeal.

We acknowledge our standard of review to be as stated in *Evans*:

"K.S.A. 60-261 provides that no error in either the admission or the exclusion of evidence is a ground for granting a new trial or for setting aside a verdict unless refusal to take such action appears to be inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. *State v. Leitner*, 272 Kan. 398, Syl. ¶ 7, 34 P.3d 42 (2001); *State v. Morris*, 255 Kan. 964, Syl. ¶ 6, 880 P.2d 1244 (1994).

"Errors in violation of a constitutional right of a party are governed by the federal constitutional error rule. *State v. Lyons*, 266 Kan. 591, 598, 973 P.2d 794 (1999). Under the federal constitutional error rule, an error of constitutional magnitude is serious and may not be found harmless unless the appellate court is willing to declare a belief that it was harmless beyond a reasonable doubt. Before the court may declare the error harmless, it must be able to declare beyond a reasonable doubt that the error had little, if any, likelihood of having changed the result of the trial. *Leitner*, 272 Kan. 398, Syl. ¶ 8; *State v. Clark*, 261 Kan. 460, 469, 931 P.2d 664 (1997); *State v. McClanahan*, 259 Kan. 86, Syl. ¶ 4, 910 P.2d 193 (1996).

"This court has previously recognized that under the state and federal Constitutions a defendant is entitled to present the theory of his or her defense and that the exclusion of evidence that is an *integral* part of that theory violates a defendant's fundamental right to a fair trial. *Mays*, 254 Kan. at 486 (quoting *State v. Bradley*, 223 Kan. 710, Syl. ¶ 2, 576 P.2d 647 [1978]); *State v. Gonzales*, 245 Kan. 691, 699, 783 P.2d 1239 (1989). '"Few rights are more fundamental than that of an accused to present witnesses in his own defense."' *Gonzales*, 245 Kan. at 699 (quoting *Chambers v. Mississippi*,



410 U.S. 284, 302, 35 L. Ed. 2d 297, 93 S. Ct. 1038 [1973]). The right to present a defense is, however, subject to statutory rules and case law interpretation of rules of evidence and procedure. *State v. Bedford*, 269 Kan. 315, 319, 7 P.3d 224 (2000); *State v. Davis*, 256 Kan. 1, 11, 883 P.2d 735 (1994); *Bradley*, 223 Kan. at 714." *State v. Evans*, 275 Kan. at 102.

With the above standards in place, we turn to the substantive issue: Did the district court err in concluding as a matter of law that circumstantial evidence connecting Pusch to the crimes, as outlined in Marsh's proffer, was irrelevant?

The general rule is that, unless otherwise provided by statute, constitutional prohibition, or court decision, all relevant evidence is admissible. K.S.A. 60-407(f). Relevant evidence is "evidence having any tendency in reason to prove any material fact." K.S.A. 60-401(b). To establish relevance, there must be some material or logical connection between the asserted facts and the inference or result they are designed to establish. *State v. Lumley*, 266 Kan. 939, 950-51, 976 P.2d 486 (1999). We have also recognized the "probative values of direct and circumstantial evidence are intrinsically similar, and there is no logically sound reason for drawing a distinction as to the weight to be assigned to each." *State v. Scott*, 271 Kan. 103, Syl. ¶ 2, 21 P.3d 516, *cert. denied* 534 U.S. 1047 (2001).

Under the above rules of evidence, we have said: "Where the State relies on direct rather than on circumstantial evidence for conviction, evidence offered by defendant to indicate a *possible motive* of someone other than the defendant to commit the crime is incompetent *absent some other evidence to connect the third party with the crime*." (Emphasis added.) *State v. Neff*, 169 Kan. 116, Syl. ¶ 7, 218 P.2d 248, *cert. denied* 340 U.S. 866 (1950). We said in *Neff* that evidence of a third person's motive *alone* would not have any tendency to prove a material fact, but instead would serve to "confuse the jury, to permit [jurors] to indulge in speculations on

collateral matters wholly devoid of probative value relative to who committed the [crime] and to divert their attention from the main issue they were sworn to try." 169 Kan. at 123. Thus understood, the so-called third-party evidence rule has limited application and is most assuredly subordinate to the general rules of evidence and the statutory definition of relevancy in K.S.A. 60-401(b).

Our recent decision in *State v. Evans* also helps to clarify the limited application of the rule excluding third-party motive evidence. In *Evans*, the State asserted it would call two eyewitnesses to testify Evans shot the victim. In opposing the State's motion in limine, the defendant proffered the testimony of several witnesses who said they saw a third person, Reed, holding the murder weapon immediately after the shot. Thus there was direct evidence Evans shot the victim, and there was circumstantial evidence Reed shot the victim. The district court excluded the circumstantial evidence under the third-party evidence rule. 275 Kan. at 97-98. We reversed, noting that, in terms of probative value, there was no distinction between direct and circumstantial evidence. 275 Kan. at 105. We further stated:

"The trial court's exclusion of the proffered evidence was inconsistent with substantial justice and infringed upon Evans' substantial rights. The evidence Evans sought to present in this case was more than just that someone other than the defendant may have committed the crime. There was evidence that linked Reed to the commission of the crime-witnesses saw Reed holding the gun immediately after the shot was fired-and evidence that Reed subsequently admitted to shooting [the victim] and dumping his body. Under these circumstances, it was erroneous for the trial court to have excluded Evans from presenting the proffered circumstantial evidence." 275 Kan. at 106.

Both *Neff* and *Evans* clarify that, while evidence of the motive of a third party to commit the crime, standing alone, is not relevant, such evidence may be relevant if there is



other evidence connecting the third party to the crime. A corollary rule is that circumstantial evidence connecting a third party to a crime will not be excluded merely because the State relies upon direct evidence of the defendant's guilt. In short, there is no bright line rule. Instead, there must be the sound exercise of judicial discretion dependent on the totality of facts and circumstances in a given case. Here, Marsh did not merely proffer evidence of Pusch's motive. Rather, he also proffered other evidence of Pusch's connection to the crime. This required the district judge to consider whether the evidence was relevant under K.S.A. 60-407(f), and his failure to do so constitutes error.

We recognize there are decisions of our court arguably suggesting we should apply the third-party evidence rule more broadly. See *State v. Bedford*, 269 Kan. 315, 320, 7 P.3d 224 (2000); *State v. Bornholdt*, 261 Kan. 644, 666, 932 P.2d 964 (1997); *State v. Peckham*, 255 Kan. 310, 321, 875 P.2d 257 (1994); *State v. Calvert*, 211 Kan. 174, 179, 505 P.2d 1110 (1973). To the extent these cases are inconsistent with *Evans*, they are disapproved.

There are additional reasons the district court's refusal to admit the third-party evidence constituted error.

First, even under the State's inflated view of the third-party evidence rule, the rule should not have been applied as to the capital murder and the aggravated arson charges. The State's evidence on those crimes was circumstantial, not direct, because Marsh specifically denied setting the fire leading to M.P.'s death. See *Evans*, 275 Kan. at 105-06.

There also is merit to Marsh's contention that, regardless of the propriety of the district court's order in limine, it erred in failing to admit the proffered evidence after Pusch testified at trial. Marsh argues that Pusch's testimony "opened the door" to evidence connecting Pusch to the crime.

A party, through testimony, may open the door for otherwise inadmissible evidence. *State v. Bedford*, 269 Kan. at 322; *State v. McClanahan*, 259 Kan. 86, 94, 910 P.2d 193 (1996).

The admission of circumstantial evidence of a third person's culpability is constitutionally required where that third person is a government witness. 2 Jones on Evidence § 13:38 (1994) (citing the United States Supreme Court's decisions in *Olden v. Kentucky*, 488 U.S. 227, 102 L. Ed. 2d 513, 109 S. Ct. 480 [1988]; and *Davis v. Alaska*, 415 U.S. 308, 39 L. Ed. 2d 347, 94 S. Ct. 1105 [1974]). In both *Olden* and *Davis*, the Court held a defendant's constitutional right of confrontation was violated upon a showing he was prohibited from engaging in "otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness." *Olden*, 488 U.S. at 231; *Davis*, 415 U.S. at 318. As has been noted, "[w]hat greater motive could a witness have to lie, than to deflect suspicion from himself or herself?" 2 Jones on Evidence § 13:38.

Evidence that a witness was in fact the person who committed the crime is almost always relevant and should be admissible where the witness testifies against the defendant. However, we did uphold a district court's refusal to allow such evidence in *State v. Bedford*. It is on this case that the State bases its argument that Pusch's testimony did not open the door to evidence of his involvement in the crime.

In *Bedford*, our decision was based upon unique circumstances. Although the estranged husband in *Bedford* testified on behalf of the State, his testimony simply showed that the victim went to a bar on the day of the murder, after which he never saw the victim again. 269 Kan. at 319-321. There was apparently no testimony by him in any way connecting the defendant to the murder and thus little need to question his credibility.

Having concluded the district court erred in entering an order in limine, we turn to the issue of whether the exclusion of the third-party evidence violated Marsh's fundamental right to a fair trial. We will not unduly extend the length of this opinion with an exhaustive review of the evidence proffered by Marsh that tended to connect Pusch to the crime. The fact



is the district court misconstrued the third-party evidence rule and did not determine whether the proffered evidence was otherwise admissible under the rules of evidence. Clearly, much of the evidence sought to be introduced demonstrated more than mere motive, and we are not prepared to say beyond a reasonable doubt that the district court's error had little, if any, likelihood of altering the jury's determination that Marsh committed capital murder. See *Chapman v. California*, 386 U.S. 18, 23-24, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967). Upon remand, the district court must carefully consider the relevancy of each "piece" of challenged evidence to avoid prejudicing Marsh's right to present his theory of defense.

We conclude a new trial must be ordered for the crimes of capital murder and aggravated arson.

## CONSTITUTIONALITY OF K.S.A. 21-4624(e)

At the penalty phase of Marsh's trial, the district court's jury instructions and verdict forms followed the language of K.S.A. 21-4624(e) by requiring a death sentence if the jury found aggravating circumstances were not outweighed by mitigating circumstances. The governing statute reads:

"If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." K.S.A. 21-4624(e).

Under the authority of this provision, Marsh's jury was directed that a tie must go to the State. In the event of equipoise, *i.e.*, the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required.

Since Marsh's sentencing proceeding, we decided *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001).

In *Kleypas*, we first held that the weighing equation in K.S.A. 21-4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments. We avoided striking the statute down as unconstitutional on its face only by construing it to mean the opposite of what it said, *i.e.*, to require aggravating circumstances to outweigh mitigating circumstances. 272 Kan. 894, Syl. ¶ ¶ 45-48. This reasoning compelled us to vacate Kleypas' death sentence and remand the case for reconsideration of the death penalty under proper instructions on the weighing equation. 272 Kan. 894, Syl. ¶ 49.

In *Kleypas*, after the majority determined that K.S.A. 21-4624(e) as written violated the Eighth and Fourteenth Amendments, it added:

"Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise." 272 Kan. at 1016.

"The legislative intent in passing the death penalty act is obvious. K.S.A. 21-4624 provides for a death sentencing scheme by which a sentence of death is imposed for certain offenses. By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual



punishment. Our holding requires that this case be remanded for the jury to reconsider imposition of the death penalty." 272 Kan. at 1018.

Here, Marsh correctly notes, and the State concedes, that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled.

We agree.

After a discussion of applicable case law, the *Kleypas* majority succinctly summarized why K.S.A. 21-4624(e) as written did not comport with the Eighth and Fourteenth Amendments:

"The legislature cannot mandate a death sentence for any category of murder. The legislature is limited to defining who is eligible, within constitutional limits, to receive the death penalty. It is for the jury, within permissible guidelines, to determine who will live and who will die. The issue is not whether the penalty of death is per se cruel and unusual punishment. *Furman* [*v. Georgia*, 408 U.S. 238] did not hold that the death penalty was cruel and unusual punishment per se under the Eighth Amendment. Here the issue, as that before the *Furman* court, is whether the process used to select which defendant will receive the irrevocable penalty of death 'comports with the basic concept of human dignity at the core of the [Eighth] Amendment.' *Gregg* [*v. Georgia*,] 428 U.S. at 183.

"Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its 'reasoned moral response' to the mitigating circumstances? We conclude it does not. Nor does it comport

with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a 'tie goes to the defendant' when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments." 272 Kan. at 1015-16.

In dissent, Justice Davis disagreed with the majority's holding that the weighing equation *as written* in K.S.A. 21-4624(e) was unconstitutional. 272 Kan. at 1125. Chief Justice McFarland joined in the dissent, and Justice Abbott, writing separately, concurred with Justice Davis. 272 Kan. at 1136.

Since *Kleypas* was decided, there have been no persuasive Eighth or Fourteenth Amendment cases helpful to a resolution of the facial constitutionality questions. Although *Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002), overruled *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), which had been relied upon by the *Kleypas* majority, it did so only on a distinct point of law, *i.e.*, whether a jury or a judge must make the findings required on aggravating and mitigating circumstances.

In their dissents today, Justices Davis and Nuss nevertheless revisit the constitutionality of K.S.A. 21-4624(e) as written. They, joined by Chief Justice McFarland, argue first that equipoise will be rare. We cannot know this.

Second, they focus on cases that predate *Walton* and analyze distinct statutory language, asserting these decisions mean the Constitution guarantees capital defendants only an opportunity to have mitigating evidence considered by the jury. These cases, obviously, do not control.

Finally, our dissenting colleagues protest that we should rely on language in Justice Blackmun's *Walton* dissent to conclude that a majority of the United States Supreme Court has already implicitly decided that the equipoise provision



before us is constitutional. Simply stated, that position failed to draw a majority in *Kleypas*; Justices Lockett, Allegrucci, Six, and Larson voted against it. It still fails to draw a majority for good reason. Although we do not believe any useful purpose is served by further extensive restatement of the opposing rationales of the *Kleypas* majority and dissent, we feel compelled to re-emphasize that a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us. This remains true, no matter how lower federal courts or other state courts have interpreted the ruling in *Walton*. The Arizona statute at issue in that case was worded differently; and, as Justice Nuss acknowledges, Justice White's plurality decision neither used the word "equipoise" nor specifically referred to situations in which aggravators and mitigators are in balance. After full reconsideration, we reject reliance on Justice Blackmun's *Walton* dissent and continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments.

This brings us to the next issue: whether *Kleypas* properly construed the statute to reverse the effect of equipoise under the weighing equation. As Justice Davis recently emphasized,

"'it is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. [Citation omitted.] The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. [Citation omitted.] Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found

in the statute. [Citation omitted.]'" *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 339, 76 P.3d 1000 (2003) (quoting *In re Marriage of Killman*, 264 Kan. 33, 42-43, 955 P.2d 1228 (1998).

We also are mindful of additional canons of statutory interpretation related to constitutional challenges:

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the constitution. In determining constitutionality, it is the court's duty to uphold a statute under attack rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done. Statutes are not stricken down unless the infringement of the superior law is clear beyond a reasonable doubt. [Citation omitted.]" *State v. Engles*, 270 Kan. 530, 531, 17 P.3d 355 (2001).

"'"[A] statute apparently void on its face may be constitutional when limited and construed in such a way as to uphold its constitutionality by reading the necessary judicial requirements into the statute. This has often been done when it is clear that such an interpretation will carry out the intent of the legislature. *State v. Motion Picture Entitled 'The Bet'*, 219 Kan. 64, 70, 547 P.2d 760 (1976); *State v. Gunzelman*, 210 Kan. 481, 502 P.2d 705 (1972); *State v. Hart*, 200 Kan. 153, 434 P.2d 999 (1967)."'" *Kleypas*, 272 Kan. at 1017.

Applying these two canons in *Kleypas*, we held that the unconstitutional weighing equation in K.S.A. 21-4624(e) could be construed to carry out the legislature's intent to enact a constitutional death penalty statute. 272 Kan. at 1018. This approach is commonly referred to by legal scholars as the "avoidance doctrine" or the "rule of constitutional doubt."

As articulated by the United States Supreme Court, the rule of constitutional doubt is that the Supreme Court will not



strike down a statute as unconstitutional if the statute can be construed, in a manner consistent with the will of Congress, to comport with constitutional limitations. This rule of constitutional construction was described as follows in *Almendarez-Torres v. United States*, 523 U.S. 224, 238, 140 L. Ed. 2d 350, 118 S. Ct. 1219 (1998):

"'This canon is followed out of respect for Congress, which we assume legislates in the light of constitutional limitations.' [Citations omitted.] The doctrine seeks in part to minimize disagreement between the branches by preserving congressional enactments that might otherwise founder on constitutional objections. It is not designed to aggravate that friction by creating (through the power of precedent) statutes foreign to those Congress intended, simply through fear of a constitutional difficulty that, upon analysis, will evaporate. Thus, those who invoke the doctrine must believe that the alternative is a serious likelihood that the statute will be held [to be] unconstitutional. Only then will the doctrine serve its basic democratic function of maintaining a set of statutes that reflect, rather than distort, the policy choices that elected representatives have made. For similar reasons, the statute must be genuinely susceptible to two constructions after, and not before, its complexities are unraveled. Only then is the statutory construction that avoids the constitutional question a 'fair' one."

In short, the United States Supreme Court is willing to exercise its power to construe statutes in a constitutional manner to save a legislative enactment rather than strike it down. However, both the United States Supreme Court and this court have acknowledged that the power to construe away constitutional infirmity is limited. "'Statutes should be construed to avoid constitutional questions, but this interpretative canon is not a license for the judiciary to rewrite language enacted by the legislature.'" *Salinas v. United States*, 522 U.S. 52, 59-60, 139 L. Ed. 2d 352, 118 S. Ct. 469 (1997). "We cannot press statutory construction 'to the point of disingenuous evasion' even to avoid a

constitutional question." *United States v. Locke*, 471 U.S. 84, 96, 85 L. Ed. 2d 64, 105 S. Ct. 1785 (1985). The maxim cannot apply where the statute itself is unambiguous. *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 149 L. Ed. 2d 722, 121 S. Ct. 1711 (2001).

Our formulation of the avoidance doctrine is similar to that of the federal courts. In *State v. Durrant*, 244 Kan. 522, 534, 769 P.2d 1174 (1989), we stated:

"This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. To accomplish this purpose the court may read the necessary judicial requirements into the statute."

These cases make plain that the avoidance doctrine is applied appropriately *only* when a statute is ambiguous, vague, or overbroad. The doctrine is not an available tool of statutory construction if its application would result in rewriting an unambiguous statute. The court's function is to interpret legislation, not rewrite it. *State v. Beard*, 197 Kan. 275, 278, 416 P.2d 783 (1966); *Patrick v. Haskell County*, 105 Kan. 153, 181 Pac. 611 (1919).

It is apparent to us that *Kleypas* failed to apply the fundamental rule of statutory construction as stated in *State ex rel. Graeber* before moving to application of the canons that support the avoidance doctrine. Indeed, the fundamental rule of statutory construction was not even noted in the majority's discussion and resolution of the equipoise issue.

Moreover, the *Kleypas* court's rationale for the rewriting of K.S.A. 21-4624(e) rested entirely upon the premise that the legislature intended to pass a death penalty statute that was constitutional. 272 Kan. at 1018. This begged the question of whether the legislature actually *succeeded* in doing so. It also constituted an insufficient justification for application of the avoidance doctrine to an unambiguous statute. Such construction by any other name is a usurpation of the



legislative prerogative. See *Beard*, 197 Kan. at 278; see also *People v. LaValle*, 3 N.Y. 3d 88, 817 N.E. 2d 341 (2004) (state's highest court cannot rewrite unconstitutional death penalty provision; it lacks legislative power to fill void left by elimination of invalid provision).

This point was not lost upon Justice Davis in his *Kleypas* dissent. His explanation was, and still is, persuasive:

"The majority reverses the weighing equation adopted by the legislature in K.S.A. 21-4624(e) with the idea that the intent of the legislature is to be carried out in a constitutional manner. There is no question, based on the express language of the legislature, that it intended to mandate the imposition of a death sentence where the existence of such aggravating circumstances is not outweighed by any mitigating circumstances found to exist. The precise question was brought to the attention of the legislature in testimony by the attorney general, who recommended that the statute provide for the aggravating circumstances to outweigh the mitigating circumstances before a death sentence may be imposed. The legislature rejected that suggestion of the attorney general and adopted our present statute.

"The majority, however, replaces the express language with its own language based upon its conclusion that this new language carries out the intent of the legislature in a constitutional manner. Because the new language mandated by the majority is contrary to the expressed intent and language adopted by the legislature in K.S.A. 21-4624(e), I believe the majority *invades the province of the legislature*. In the face of a clearly expressed legislative intent, the majority not only strikes this clear language as unconstitutional but adopts language exactly the opposite of what the legislature stated. If the language of the statute offends the Constitution, the appropriate judicial solution, in my opinion, is to so hold and let the legislature resolve the matter consistent with the court's opinion." 272 Kan. at 1124-25.

We agree with Justice Davis' reasoning and conclusion that the *Kleypas* majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it. Chief Justice McFarland's dissent, which argues that the legislature apparently did not mind the interference misses the point. (It also reads too much into its inaction when the court had removed its incentive to act.) Justice Davis had it exactly right: The appropriate, limited judicial response to the problem identified for the first time in *Kleypas* was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper.

This was especially true given the legislative history. As the *Kleypas* majority observed:

"It is important to note that on March 14, 1995, the attorney general analyzed the statute and recommended in the House Judiciary Committee of the Kansas Legislature that the statute be amended to require that aggravating circumstances outweigh mitigating circumstances, stating: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense . . . ." Unfortunately, the legislature did not follow the attorney general's recommendation." *Kleypas*, 272 Kan. at 1014-15.

In *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), the bedrock principle of separation of powers in our tripartite form of government was at issue and eloquently explained. Padilla, an American citizen, was being held by the United States as an "enemy combatant" associated with Al Qaeda at a naval brig in South Carolina. He filed a habeas petition, relying primarily upon 18 U.S.C. § 4001(a) (2000), which provides: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." In support of its motion to



dismiss, the Government argued a literal reading of 18 U.S.C. § 4001(a) would conflict with Article II, section 2, clause 1 of the Constitution, which makes the President of the United States "Commander in Chief of the Army and Navy of the United States."

In rejecting the government's argument, the court stated:

"The government suggests that because reading the statute to impinge on the President's Article II powers, including detention of enemy combatants, creates a danger that the statute might be found unconstitutional as applied to the present case, a court should read the statute so as not to cover detention of enemy combatants, applying the canon that a statute should be read so as to avoid constitutional difficulty. *See, e.g., Jones v. United States*, 529 U.S. 848, 857, 120 S. Ct. 1904, 146 L. Ed. 2d 902 (2000) (citing 'the guiding principle that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."') (quoting *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408, 29 S. Ct. 527, 53 L. Ed. 836 (1909)).

"However, this doctrine of constitutional avoidance '"has no application in the absence of statutory ambiguity."' *HUD v. Rucker*, 535 U.S. 125, 122 S. Ct. 1230, 1235, 152 L. Ed. 2d 258 (2002) (quoting *United States v. Oakland Cannabis Buyers' Cooperative*, 532 U.S. 483, 494, 121 S. Ct. 1711, 149 L. Ed. 2d 722 (2001)). Any other approach, as pointed out in *Rucker*, '"while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution."' *Id.* at 1235-36 (quoting *United States v. Albertini*, 472 U.S. 675, 680, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985)). That is, if a court read an ambiguity into an unambiguous statute simply for the purpose of avoiding an adverse decision as to the constitutionality of that statute, the court would be exercising

legislative powers and thereby usurping those powers. There is no ambiguity here. The plain language of the statute encompasses all detentions of United States citizens. Therefore, the constitutional avoidance canon cannot affect how the statute is read." 233 F. Supp. 2d at 597.

Our holding that K.S.A. 21-4624(e) is unconstitutional on its face presumptively requires that we overrule that portion of *Kleypas* upholding the statute through application of the avoidance doctrine. The only contrary argument left for our consideration is that the doctrine of stare decisis should prevent us from doing so.

In *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 356, 789 P.2d 541(1990), *overruled on other grounds Bair v. Peck*, 248 Kan. 824, 811 P.2d 1176 (1991), we stated:

"It is recognized under the doctrine of stare decisis that, once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity demonstrating a continuing legitimacy of judicial review. Judicial adherence to constitutional precedent ensures that all branches of government, including the judicial branch, are bound by law.

". . . The general American doctrine as applied to courts of last resort is that a court is not inexorably bound by its own precedents but will follow the rule of law which it has established in earlier cases, unless clearly convinced that the rule was originally erroneous or is not longer sound because of changing conditions and that more good than harm will come by departing from precedent."

This is consistent with the United States Supreme Court's 2003 decision in *Lawrence v. Texas*, 539 U.S. 558, 156 L. Ed. 2d 508, 525, 123 S. Ct. 2472 (2003), in which the Court



overruled its 1986 decision in *Bowers v. Hardwick*, 478 U.S. 186, 92 L. Ed. 2d 140, 106 S. Ct. 2841 (1986). The Court stated:

"The doctrine of *stare decisis* is essential to the respect accorded to the judgments of the Court and to the stability of the law. It is not, however, an inexorable command. *Payne v. Tennessee*, 501 U.S. 808, 828, 115 L. Ed.2d 720, 111 S. Ct. 2597 (1991) ('*Stare decisis* is not an inexorable command; rather, it "'is a principle of policy and not a mechanical formula of adherence to the latest decision, [however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience]'" (quoting *Helvering v. Hallock*, 309 U.S. 106, 119, 84 L. Ed. 604, 60 S. Ct. 444 (1940))." 539 U.S. at 577.

Similarly, in *Ring*, 536 U.S. 584, the Court observed that, "[a]lthough '"the doctrine of *stare decisis* is of fundamental importance to the rule of law[,]" . . . [o]ur precedents are not sacrosanct.' *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), (quoting *Welch v. Texas Dept. of Highways and Public Transp.*, 483 U.S. 468, 494 (1987). '[W]e have overruled prior decisions where the necessity and propriety of doing so has been established.' 491 U.S. at 172."

In particular, the United States Supreme Court has frequently emphasized that stare decisis has less persuasive force in constitutional adjudication. As Justice Scalia stated in *Vieth v. Jubelirer*, 541 U.S. 267, ___, 158 L. Ed 2d 546, 124 S. Ct. 1769, 1792 (2004), which overturned precedent concerning congressional redistricting:

"Considerations of stare decisis do not compel us to allow *Bandemer* to stand. That case involved an interpretation of the Constitution, and the claims of stare decisis are at their weakest in that field, where our mistakes cannot be corrected by Congress. See *Payne v. Tennessee*, 501 U.S. 808, 828, 111 S. Ct. 2697, 115 L. Ed. 2d 720 (1991). They are doubly weak in *Bandemer* because the majority's inability to

enunciate the judicially discernible and manageable standard that it thought existed (or did not think did not exist) presaged the need for reconsideration in light of subsequent experience. And they are triply weak because it is hard to imagine how any action taken in reliance upon *Bandemer* could conceivably be frustrated – except the bringing of lawsuits, which is not the sort of primary conduct that is relevant.

"While we do not lightly overturn one of our own holdings, 'when governing decisions are unworkable or are badly reasoned, "'this Court has never felt constrained to follow precedent.'" *Id.*, at 827, 111 S. Ct. 2597 (quoting *Smith v. Allwright*, 321 U.S. 649, 665, 64 S. Ct. 757, 88 L. Ed. 2d 987 (1944)). Eighteen years of essentially pointless litigation have persuaded us that *Bandemer* is incapable of principled application. We would therefore overrule that case, and decline to adjudicate these political gerrymandering claims." 541 U.S. at ___, 158 L. Ed. 2d at 575-76. See also *Harris v. United States*, 536 U.S. 545, 581, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002) (Thomas, J., dissenting) (when court "has wrongly decided a constitutional question, the force of stare decisis is at its weakest"; relative recency of rule also weakens precedential value).

Furthermore, a rule not previously subjected to "full-dress argument" is rightly examined more closely before it is applied a second time. See *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 571, 124 L. Ed. 2d 472, 113 S. Ct. 2217 (1993). Such should be the case with our *sua sponte* application of the avoidance doctrine in *Kleypas*. Although we should not casually discard precedent, neither should we shy away from admitting "'when governing decisions are unworkable or are badly reasoned.'" *United States v. Dixon*, 509 U.S. 688, 712, 125 L. Ed. 2d 556, 113 S. Ct. 2849 (1993) (citing *Payne v. Tennessee*, 501 U.S. at 827).



The Chief Justice's dissent focuses on factors listed by Justice O'Connor in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), "prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." 505 U.S. at 854-55. But Justice O'Connor explicitly labeled "examples." Any exhaustive list of such considerations necessarily would also include whether the court now recognizes that its earlier ruling was incorrect, unwise, or did violence to the roles assigned the various branches of government.

We conclude that the second holding of *Kleypas* – that the equipoise provision could be rescued by application of the avoidance doctrine – is not salvageable under the doctrine of stare decisis. That holding of *Kleypas* is overruled. Stare decisis is designed to protect well settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. *Kleypas*' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature.

Our decision today to confine the application of the avoidance doctrine to appropriate circumstances recognizes the separation of powers and the constitutional limitations of judicial review and rightfully looks to the legislature to resolve the issue of whether the statute should be rewritten to pass constitutional muster. This is the legislature's job, not ours. This decision does more in the long run to preserve separation of powers, enhance respect for judicial review, and further predictability in the law than all the indiscriminate adherence to stare decisis can ever hope to do.

HARD 40 SENTENCE SUFFICIENCY

Marsh contends there was insufficient evidence to support the district court's finding of aggravating circumstances not outweighed by mitigating circumstances. See K.S.A. 2003 Supp. 21-4635. Where the sufficiency of the evidence is challenged for establishing the existence of an aggravating circumstance in a hard 40 proceeding, the standard of review to be applied is whether, after reviewing all the evidence, viewed in the light most favorable to the State, a rational factfinder could have found the existence of the aggravating circumstances by a preponderance of the evidence.

In imposing the hard 40, the district court found the same aggravators as did the jury in imposing the death penalty: (1) the defendant knowingly or purposely killed or created a great risk of death to more than one person; (2) the killing was especially heinous, atrocious, or cruel; and (3) the killing was committed in order to avoid or prevent a lawful arrest or prosecution. Further, in applying the weighing equation as required in K.S.A. 2003 Supp. 21-4635, the district judge stated:

"I believe that these aggravating factors, *each one individually – that you wouldn't necessarily need to take the three of them as a whole combined – that any one of those three are sufficient to outweigh any mitigating circumstances in this case* regarding the death of [Marry], which would require the imposition of the maximum penalty." (Emphasis added.)

Because we have concluded Marsh is entitled to a new trial on the charge of capital murder, a finding he knowingly or purposely killed or created a great risk of death to more than one person is problematic. Likewise, the district court's failure to admit evidence of Pusch's possible involvement could arguably influence the finding that Marry's killing was especially heinous, atrocious, or cruel. There does exist, however, sufficient evidence to support the district court's finding that Marry's murder was committed by Marsh to



avoid or prevent a lawful arrest or prosecution. In his confession to investigators, Marsh indicated that, after he entered the Pusch residence, he decided not to carry out the extortion; but Marry's early arrival threw him into a panic, and he shot her. The district court could reasonably infer Marsh shot Marry to avoid lawful arrest or prosecution for aggravated burglary. Conversely, the mitigating evidence presented by Marsh consisted of several character witnesses who testified to Marsh's character at the time they had known him.

We conclude, based upon the district court's statement, that any one of the aggravating circumstances was not outweighed by mitigating circumstances. The district court's imposition of the hard 40 sentence is upheld. See *State v. Lopez*, 271 Kan. 119, 141, 22 P.3d 1040 (2001) (stating the district court's weighing of aggravating and mitigating circumstances is within its sound discretion and will not be disturbed on appeal absent an abuse of discretion.)

HARD 40 SENTENCE CONSTITUTIONALITY

Marsh argues the Kansas hard 40 sentencing scheme is unconstitutional because K.S.A. 2003 Supp. 21-4635 does not require aggravating circumstances to be submitted to a jury and proved beyond a reasonable doubt. He contends *State v. Conley*, 270 Kan. 18, 11 P.3d 1147 (2000), *cert. denied* 532 U.S. 932 (2001), should be overruled.

This argument was not made to the district court. Normally, constitutional grounds asserted for the first time are not properly before this court for review. *State v. Shears*, 260 Kan. 823, 837, 925 P.2d 1136 (1996). However, we have long recognized three exceptions to this rule: (1) where the newly asserted claim involves only a question of law arising on proved or admitted facts and determinative of the case; (2) where consideration of the claim is necessary to serve the ends of justice or to prevent the denial of fundamental rights; and (3) where the district court is right for the wrong reason. See *Pierce v. Board of County Commissioners*, 200 Kan. 74,

80-81, 434 P.2d 858 (1967). Here, the issue raised by Marsh requires we address only a question of law.

In *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), the United States Supreme Court held "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. In *Conley*, we held the hard 40 sentencing scheme did not increase the statutory maximum, but rather simply set a statutory minimum. See 270 Kan. at 33-34. We also concluded our holding was consistent with the United States Supreme Court's pronouncement in *McMillan v. Pennsylvania*, 477 U.S. 79, 88-89, 91 L. Ed. 2d 67, 106 S. Ct. 2411 (1986). In *McMillan*, the Court held a judicial finding of aggravating factors that only raises the minimum sentence that may be imposed by the district court was permissible. 477 U.S. at 89.

Marsh argues the United States Supreme Court's ruling in *Ring v. Arizona*, 536 U.S. 584, requires us to reverse our holding in Conley. We disagree. In *State v. Boldridge*, 274 Kan. 795, 57 P.3d 8 (2002), this court addressed a constitutional challenge to the hard 50 sentencing scheme under K.S.A. 2001 Supp. 21-4635. The court noted the defendant's reliance on *Ring* but found no reason to alter its reasoning and holdings in *State v. Douglas*, 274 Kan. 96, 49 P.3d 446 (2002), *Conley*, and *State v. Boorigie*, 273 Kan. 18, 41 P.3d 764 (2002). *Boldridge*, 274 Kan. at 812.

Additionally, Marsh contends we misread *McMillan* in deciding *Conley*. This is not a novel argument. We have consistently declined to overrule *Conley* and have rejected the argument that our reliance on *McMillan* was misplaced. See *State v. Albright*, 273 Kan. 811, 826-27, 46 P.3d 1167 (2002). The decision in *Harris v. United States*, 536 U.S. 545, 153 L. Ed. 2d 524, 122 S. Ct. 2406 (2002), decided the same day as *Ring*, reaffirms the continuing validity of



*McMillan*. In *Harris*, the Supreme Court considered *Apprendi* but held that increasing a defendant's minimum sentence based upon a judge's finding that a weapon was brandished did not violate the Fifth or Sixth Amendments. *Harris*, 536 U.S. at 568.

For the foregoing reasons, we reject Marsh's argument that *Conley* was wrongly decided and should be overruled.

## CONCLUSION

We conclude K.S.A. 21-4624(e) is unconstitutional on its face, thus rendering moot guilt and penalty phase issues dependent on imposition of the death penalty. We have carefully considered all of the issues of trial error raised by Marsh; we hold those not discussed in this opinion insufficient to constitute reversible error in this case.

We affirm Marsh's convictions and sentences for aggravated burglary and the premeditated murder of Marry; we reverse and remand for new trial Marsh's convictions for the capital murder of M.P. and aggravated arson.

DAVIS, J., dissenting: I respectfully dissent from the majority's holding that the weighing equation in K.S.A. 21-4624(e) is unconstitutional on its face. In my opinion, K.S.A. 21-4624(e) was constitutional when it was passed by the Kansas Legislature and remains constitutional today.

The majority holds that the Kansas death penalty is unconstitutional on its face under the Eighth Amendment to the United States Constitution. According to the majority, the offending provision lies in the following weighing equation found in K.S.A. 21-4624(e):

"If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the *existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist*, the defendant shall

be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." (Emphasis added.)

In *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), the majority held that the above weighing equation was unconstitutional but attempted to salvage the death penalty by rewriting the equation language to provide that the aggravating circumstances must outweigh the mitigating circumstances before death may be imposed. The majority today holds that the attempt in *Kleypas* was erroneous and that the entire death penalty is unconstitutional under the Eighth Amendment.

The majority, in this case, voids the entire death penalty law because in the extremely unlikely event that a jury would find that the aggravating circumstance or circumstances exactly equal the mitigating circumstances, death must be imposed. The majority claims that in such an unlikely event a tie must go to the defendant. According to the majority, because under the weighing equation adopted by the Kansas Legislature the tie goes to the State, the entire death penalty is unconstitutional.

I begin with the majority's conclusion that in order for the death penalty to be constitutional in Kansas, *a tie in the aggravating circumstances and mitigating circumstances must go to the defendant* under the Eighth Amendment. I agree with the majority that the Kansas Legislature consciously chose the weighing equation but strongly disagree that the language used is unconstitutional under the Eighth Amendment. I may personally disagree with the legislature's policy decision that a tie goes to the State but I cannot conclude that its enactment is unconstitutional because of that language unless the United States Constitution, as interpreted by the United States Supreme Court, supports such a conclusion. An analysis of the United States Supreme Court jurisprudence, as well as other decisions addressing this point, does not support such a conclusion and, in fact, supports the opposite conclusion.



As a prelude to my analysis, I think it is important to stress just how unlikely it is that the "tie" envisioned by the majority would ever occur. First, before the weighing equation is even implicated, it must be proven beyond a reasonable doubt that the defendant is guilty of the crime of capital murder. Thus, for the defendant to even be eligible for the death penalty, a jury must find the existence of one or more of the following factors that make the murder committed more serious then even first-degree murder: (1) the intentional and premeditated killing of any person in the commission of kidnapping or aggravated kidnapping with the intent of holding such person for ransom; (2) the intentional and premeditated killing of any person pursuant to contract or agreement; (3) the intentional and premeditated killing of any person by an inmate or prisoner; (4) the intentional and premeditated killing of the victim of rape, criminal sodomy, or aggravated criminal sodomy; (5) the intentional and premeditated killing of a law enforcement officer; (6) the intentional and premeditated killing of more than one person as a part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct; or (7) the intentional and premeditated killing of a child under the age of 14 in the commission of kidnapping or aggravated kidnapping where such crime was committed with the intent to commit a sex offense upon or with the child or with intent that the chiid commit or submit to a sex offense. See K.S.A. 21-3439.

Once the defendant has been convicted of capital murder, he or she is death eligible. However, the death sentence may still not be imposed without a consideration of an additional set of aggravating circumstances and a consideration of mitigating circumstances. The aggravating circumstances are set forth in K.S.A. 21-4625, as follows:

"(1) The defendant was previously convicted of a felony in which the defendant inflicted great bodily harm, disfigurement, dismemberment or death on another.

"(2) The defendant knowingly or purposely killed or created a great risk of death to more than one person.

"(3) The defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.

"(4) The defendant authorized or employed another person to commit the crime.

"(5) The defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

"(6) The defendant committed the crime in an especially heinous, atrocious or cruel manner.

"(7) The defendant committed the crime while serving a sentence of imprisonment on conviction of a felony.

"(8) The victim was killed while engaging in, or because of the victim's performance or prospective performance of, the victim's duties as a witness in a criminal proceeding."

These eight categories of aggravating circumstances, all extremely serious, qualify a defendant for death only after the prosecution has proved the existence of one or more of them beyond a reasonable doubt. However, death may still not be imposed without consideration of mitigating circumstances.

A nonexclusive list of mitigating circumstances that a defendant may present to the jury are set out in K.S.A. 2003 Supp. 21-4626:

"(1) The defendant has no significant history of prior criminal activity.

"(2) The crime was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(3) The victim was a participant in or consented to the defendant's conduct.



"(4) The defendant was an accomplice in the crime committed by another person, and the defendant's participation was relatively minor.

"(5) The defendant acted under extreme distress or under the substantial domination of another person.

"(6) The capacity of the defendant to appreciate the criminality of the defendant's conduct or to conform the defendant's conduct to the requirements of law was substantially impaired.

"(7) The age of the defendant at the time of the crime.

"(8) At the time of the crime, the defendant was suffering from post-traumatic stress syndrome caused by violence or abuse by the victim."

As stated above, these mitigating circumstances are nonexclusive. Thus, the jury is instructed that mitigating circumstances it may consider also include that "[a] term of imprisonment is sufficient to defend and protect the people's safety from the defendant" as well as "any other aspect of the defendant's character, background or record, and any other aspect of the offense which was presented in either the guilt or penalty phase which you find may serve as a basis for imposing a sentence less than death." See PIK Crim. 56.00-D (2003 Supp.).

Note again the serious nature of the mitigating circumstances and the fact that there is no limit on mitigating circumstances that a defendant may present to the jury. Also note that the defendant is not required to prove these circumstances beyond a reasonable doubt.

For example, assume that a defendant kills a witness who was to testify against him in his upcoming criminal trial (aggravating circumstance). Assume further that the defendant is 19 years old at the time, came from a broken home, was abused as a child, and has no significant past criminal history (mitigating circumstances). Once the prosecution has presented evidence of the aggravating

circumstance(s) and the defendant has presented as much mitigating evidence as he wishes to the jury, it is now up to the jury to determine whether to impose the death sentence. Under our law, if the mitigating circumstances outweigh the aggravating circumstance(s) death *cannot* be imposed. If aggravating circumstances outweigh mitigating circumstances death *is* imposed. Before deliberations, the jury is instructed similar to the following:

1. If the jury unanimously finds beyond a reasonable doubt that the aggravating factor exists, and that the aggravating factor outweighs the mitigating circumstances found to exist, the sentence is death.

2. If the jury unanimously finds beyond a reasonable doubt that the aggravating factor exists, and that the mitigating circumstances found to exist outweigh the aggravating circumstance, a prison sentence is the sentence.

3. If the jury unanimously finds beyond a reasonable doubt that the aggravating factor exists, and that the aggravating factor is not outweighed by any mitigating circumstances found to exist (this would include situations where aggravating factor and mitigating circumstances are equal), the defendant is sentenced to death.

Each member of the jury then decides whether the aggravating factor has been proven beyond a reasonable doubt. Unless the jury unanimously concludes that at least one aggravating factor has been proven, death cannot be imposed. Once an aggravating factor has been proven, each juror decides what weight to give that aggravating factor and then what weight to give the mitigating factors. The total weight of the aggravating factor and the mitigating factors are then compared. In order to impose death, each member of the jury must find that the aggravating factor is not outweighed by the mitigating factors. If even one member of the jury finds that the aggravating factor is outweighed by the mitigating factors, then the defendant cannot be sentenced to death. Further, as noted above, the jury is not



limited on what mitigating evidence it can consider. Thus, even if a juror in our example determines that the mitigating circumstances offered by the defendant, *i.e.*, that he was 19 years old at the time, came from a broken home, was abused as a child, and has no significant criminal history, are insufficient to outweigh the aggravating factor, that juror still does not have to vote for death if there is any other circumstance or circumstances which in the juror's mind pushes the weight of the mitigating circumstances past the aggravating circumstance. Such circumstances can include the juror's feeling that life in prison is a sufficient sentence or simply that the defendant does not deserve to die.

As can be seen by the above example, the weighing process is not just a process of counting aggravating and mitigating circumstances. It is a process of assessing intangibles: looking at the total weight of the aggravating factors and comparing it to the total weight of the mitigating circumstances. It is for this reason that it is highly unlikely the jury will conclude that the aggravating circumstances and mitigating circumstances are exactly equal. Either the mitigating circumstances will outweigh the aggravating circumstances and a life sentence will be imposed or the aggravating circumstances will outweigh the mitigating circumstances and death will be imposed.

In the extremely unlikely event that the jury does find the aggravating circumstances and the mitigating circumstances to be exactly equal, K.S.A. 21-4624(e), as written, does mandate that the sentence be death. However, a careful examination of the United States Supreme Court's death penalty jurisprudence shows that this result does not violate the Eighth Amendment.

There is no question that the Eighth Amendment imposes several requirements with regard to capital sentencing. First, states are required to limit and channel the discretion of judges and juries "so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S.

153, 189, 49 L. Ed. 2d 859, 96 S. Ct. 2909 (1976). In order for a capital sentencing scheme to pass constitutional muster, it must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877, 77 L. Ed. 2d 235, 103 S. Ct. 2733 (1983).

The Kansas Death Penalty Act narrows the class of persons eligible for the death penalty in two ways. First, it requires a conviction of capital murder for death penalty eligibility rather than simply applying the death penalty to all first-degree murders. Second, it narrows that eligibility even further through the weighing of aggravating and mitigating factors during the penalty phase. Thus, the Kansas Legislature has limited and channeled the discretion of judges and juries "so as to minimize the risk of wholly arbitrary and capricious action" in accord with *Gregg v. Georgia*.

Further, even though the Eighth Amendment requires that jury discretion be guided, it also requires that the sentencer be allowed to retain sufficient discretion to consider all relevant mitigating evidence, so that it can ensure that "'death is the appropriate punishment in a specific case.'" *Lockett v. Ohio*, 438 U.S. 586, 601, 57 L. Ed. 2d 973, 98 S. Ct. 2954 (1978) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976). To this end, the sentencer cannot "be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604. Further, the sentencer must be able to "give effect" to this evidence. *Penry v. Lynaugh*, 492 U.S. 302, 328, 106 L. Ed. 2d 256, 109 S. Ct. 2934 (1989). Again, it must be noted that Kansas lists eight important mitigating circumstances and puts no limit on the number of such circumstances a defendant may



present. The jury is instructed that it must consider and give effect to this evidence.

Once these core principles are satisfied, however, the Eighth Amendment requires no more. Rather, the Supreme Court has made it clear that within the above guidelines, states are given wide latitude to adopt the procedure through which these principles are carried out. See *Zant v. Stephens*, 462 U.S. at 890-91 (stating that "*the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances*"). (Emphasis added.) The majority opinion says that the failure of the legislature to allow death only when aggravating circumstances outweigh mitigating circumstances is unconstitutional.

In enacting its death penalty statute, Kansas has chosen to follow the Florida system, which provides for aggravating circumstances which are then weighed against any mitigators found to exist as set forth above. See *Stringer v. Black*, 503 U.S. 222, 229-231, 117 L. Ed. 2d 367, 112 S. Ct. 1130 (1992). The Supreme Court held that the Florida system satisfied constitutional requirements in *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed. 2d 913, 96 S. Ct. 2960 (1976).

In states which follow the Florida system, *i.e.* "weighing states," questions have arisen over the composition of the weighing equation. The Supreme Court answered those questions in a series of three cases: *Blystone v. Pennsylvania*, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990); *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990); and *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), *overruled on other grounds Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

In *Blystone*, the question was whether having a mandatory weighing equation which required death where the jury found that the aggravating circumstances outweighed the mitigating circumstances violated the Constitution. The

argument was that this mandatory penalty somehow "limited the discretion of the jury" in contravention of *Lockett*'s requirement that a capital jury be allowed to consider and give effect to all relevant mitigating evidence. See *Blystone*, 494 U.S. at 303.

The Supreme Court held that the Pennsylvania scheme satisfied the *Lockett* requirement for two reasons. First, the statute did not limit the mitigating factors that could be taken into account (Kansas does not limit the mitigating factors). Second, it did not automatically mandate death upon conviction for certain types of murder (nor does Kansas); rather, it mandated the imposition of death only after a finding that the aggravating circumstances outweighed the mitigating circumstances. 494 U.S. at 305-06. The Supreme Court stated that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." 494 U.S. at 307. Further, the Supreme Court noted that it was not particularly concerned with the form or procedure used in establishing weighing equations so long as the requirement that the jury be allowed to consider and give effect to all relevant mitigating evidence is satisfied, stating: "*Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished.*" (Emphasis added.) 494 U.S. at 309.

The next case concerning weighing equations, *Boyde v. California*, addressed a similar question with regard to California's weighing equation, which mandated death upon a jury's finding that the aggravating circumstances outweigh mitigating circumstances. The Supreme Court in *Boyde*, for the same reasons as in *Blystone*, found the statute constitutional. In the process, the Supreme Court reiterated that "'[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence'" and further stated that "there is no . . . constitutional requirement of unfettered sentencing



discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 494 U.S. at 377.

*Blystone* and *Boyde* stand, therefore, for the proposition that it is not unconstitutional for a weighing equation to mandate death upon certain findings, so long as the jury is allowed to consider and give effect to all relevant mitigating circumstances. They also confirm that a weighing equation which mandates death upon the jury's finding that aggravating circumstances outweigh mitigating circumstances satisfies this standard. They did not, however, address whether other versions of the weighing equation, specifically the weighing equation used in K.S.A. 21-4624(e), meet this standard. That question was left for the next "weighing equation" case, *Walton v. Arizona*, 497 U.S. 639.

*Walton* is particularly important to this case because of the similarities between the weighing equation at issue in *Walton* and that in K.S.A. 21-4624. The Arizona weighing equation in *Walton* provided that the sentencer (in that case, a judge) was to weigh the aggravating circumstances against the mitigating circumstances and impose death if there were "no mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 643-44. Although the words used are different, Arizona, then and now, has interpreted this weighing equation to mean exactly the same as the one used in K.S.A. 21-4624(e): Death is the penalty unless the aggravating circumstances are outweighed by the mitigating circumstances. See *State v. Gretzler*, 135 Ariz. 42, 53-55, 659 P.2d 1 (1983); *State v. Ysea*, 191 Ariz. 372, 375, 956 P.2d 499 (1998) (stating that "[i]f the judge finds one or more of the aggravating factors listed in § 13-703[F], the defendant is death eligible, and if the aggravating factors are not outweighed by mitigating factors listed in § 13-703[G], the resulting sentence is death"). See also *Walton*, 497 U.S. at 687 (Blackmun, J., dissenting) (stating that "[t]he Arizona

Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation").

Further, one of the issues in *Walton* was the same equipoise question faced in *Kleypas* and now in this case, the validity of the weighing equation under the Eighth Amendment. See *Walton*, 497 U.S. at 651-52. In order to understand the Court's holding on the issue, it is important to note that *Walton* reached the Supreme Court in part as the result of a split between the Arizona Supreme Court and the Ninth Circuit Court of Appeals on the equipoise issue. In *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988) (en banc), the Ninth Circuit Court of Appeals held that the Arizona death penalty scheme was unconstitutional for the same reason the majority opinion in this case holds the Kansas statute K.S.A. 21-4624(e) unconstitutional:

"While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. *This is because in situations where the mitigating and aggravating circumstances are in balance*, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that '[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect.'" 865 F.2d at 1043-44. (Emphasis added.)

This ruling, however, conflicted with the decision of the Arizona Supreme Court which summarily upheld the constitutionality of the Arizona death penalty scheme in *State v. Walton*, 159 Ariz. 571, 584-85, 769 P.2d 1017 (1989). In order to resolve this split between the two cases, the United States Supreme Court granted *certiorari* in



*Walton*. See *Walton*, 497 U.S. at 647 ("Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case, see *Adamson v. Ricketts* [citation omitted], we granted certiorari . . . to resolve the conflict and to settle issues that are of importance generally in the administration of the death penalty.").

The Supreme Court of the United States addressed Walton's argument that because the Arizona statute provided that the court must impose the death penalty if one or more aggravating circumstances are found and the mitigating circumstances are insufficient to call for leniency, this created an unconstitutional presumption that death was the proper sentence. 497 U.S. at 651-52. The Court rejected this contention, stating:

"Our recent decisions in *Blystone v. Pennsylvania* [citation omitted] and *Boyde v. California* [citation omitted] foreclose this submission. *Blystone* rejected a challenge to a jury instruction based on a Pennsylvania statute requiring the imposition of the death penalty if aggravating circumstances were found to exist but no mitigating circumstances were present. We pointed out that '[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence,' [citation omitted] and concluded that because the Pennsylvania statute did not preclude the sentencer from considering any type of mitigating evidence, [citation omitted] it was consonant with that principle. In addition, the Court concluded that the statute was not 'impermissibly "mandatory" as that term was understood' in *Woodson v. North Carolina* [citation omitted] and *Roberts v. Louisiana* [citation omitted] because it did not automatically impose death upon conviction for certain types of murder. [Citation omitted.] The same is true of the Arizona statute.

"Similarly, *Boyde v. California*, *supra*, upheld a pattern jury instruction which stated that '[i]f you conclude that the

aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.' [Citation omitted]. The Court specifically noted that 'there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and *States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.*'" [Citation omitted.]

"Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*." (Emphasis added.) 497 U.S. at 651-52.

Justices Blackmun, Brennan, Marshall, and Stevens dissented from this holding, arguing that the fact that the Arizona statute required death if the aggravating and mitigating circumstances were in equipoise violated the Eighth Amendment. See 497 U.S. at 687 (Blackmun, J., dissenting). The dissenting opinion in *Walton* is the reason the majority in this case holds K.S.A. 21-4624(e) unconstitutional. *Walton*, however, rejected the equipoise argument, holding just the opposite of the majority opinion in this case.

*Walton* not only reaffirmed the holdings in *Blystone* and *Boyde* that it is not a violation of the Eighth Amendment to mandate death upon certain findings, such as that the aggravating factors outweigh the mitigating factors, but also extended that rationale to a weighing equation such as that used in Arizona which mandated death unless the mitigating factors were sufficiently substantial to call for leniency, that is, unless aggravating factors were not outweighed by the mitigating circumstances.

It is clear to me that the United States Supreme Court's opinion in *Walton* answered the equipoise question. The Ninth Circuit certainly thought it did. In *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), it recognized that *Walton* overturned its decision in *Adamson v. Ricketts* regarding the constitutionality of the Arizona death penalty. The Idaho



Supreme Court also thought so. In *State v. Hoffman*, 123 Idaho 638, 646-47, 851 P.2d 934 (1993), the Idaho Supreme Court found that under *State v. Walton*, its statute which required a defendant to prove mitigating circumstances which outweighed aggravating circumstances was constitutional. The Illinois Supreme Court, in a decision which actually predated *Walton*, cited *Blystone* for this same proposition. See *People v. Thomas*, 137 Ill. 2d 500, 542, 561 N.E.2d 57 (1990).

Cases decided by the United States Supreme Court since *Blystone*, *Boyde*, and *Walton* have continued with the theme established in those cases. In *Harris v. Alabama*, 513 U.S. 504, 512, 130 L. Ed. 2d 1004, 115 S. Ct. 1031 (1995), the Supreme Court, in finding that Alabama's death penalty scheme was not unconstitutional even though it did not give the judge guidance in determining whether to accept the jury's advisory verdict, reiterated: "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" Similarly, in *Buchanan v. Angelone*, 522 U.S. 269, 276, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998), the Court stated:

"In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citations omitted.] *However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.* [Citations omitted.] Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence.

"But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." (Emphasis added.)

Given the United States Supreme Court's continued insistence that the Constitution does not require a specific method for balancing aggravating and mitigating circumstances, and its specific approval of Arizona's weighing equation which is identical in practice to that in K.S.A. 21-4624(e), I find it difficult to understand how the majority comes to its conclusion that K.S.A. 21-4624(e) is unconstitutional on its face. Certainly, the conclusion cannot come from the cases which have addressed the subject. The few cases from other jurisdictions which might lend support the majority's conclusion are entirely unpersuasive.

Besides our opinion in *Kleypas*, a weighing equation such as the one used in K.S.A. 21-4624(e) has been declared unconstitutional in only four cases: the aforementioned Ninth Circuit opinion in *Adamson v. Ricketts*, 865 F.2d 1011; *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993); *People v. Young*, 814 P.2d 834 (Colo. 1991); and *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987). The circumstances of each of these cases, however, give them little weight.

First, *Adamson*, as the Ninth Circuit Court recognized, was abrogated by the Supreme Court's opinion in *Walton* v. Arizona. See *Adamson v. Lewis*, 955 F.2d at 619. This abrogation also causes problems for *Hulsey v. Sargent*, in that the federal district court in that case relied entirely on *Adamson v. Ricketts* for its decision and did not even mention the effect of *Walton*. See 868 F. Supp. at 1103. It is highly questionable whether the decision in *Hulsey* would have survived review by the Eighth Circuit Court of Appeals, given its express reliance on *Adamson v. Ricketts* and the Ninth Circuit's determination that *Adamson v. Ricketts* was abrogated by *Walton*. The State's appeal in *Hulsey*, however, was dismissed by the Eighth Circuit because the State failed to timely file its notice of appeal. See *Hulsey v. Sargent*, 15 F.3d 115, 118-19 (8th Cir. 1994).



Nor are the two state cases, *Biegenwald* and *Young*, persuasive. *Biegenwald* was decided in 1987, before *Blystone*, *Boyde*, and *Walton*. The New Jersey Supreme Court in *Biegenwald* found that "fundamental fairness" required that the defendant get the benefit of the doubt where the "explanations for his misconduct were equally as significant as the culpable aspects of that misconduct." See 106 N.J. at 62. However, this argument for fundamental fairness was not keyed to the United States Constitution but rather to New Jersey's "traditional concern for the rights of defendants charged with capital offenses" and the legislative history of the adoption of the weighing equation which suggested that the New Jersey legislature had actually meant to adopt a different equation requiring the aggravating factors to outweigh the mitigating factors. See 106 N.J. at 59-60.

Similarly, in *Young* the Colorado Supreme Court determined that a weighing equation which mandated death when the aggravating and mitigating factors were in equipoise would violate the requirement that a death penalty scheme would be rational and reliable. See 814 P.2d at 845. In reaching this conclusion, the court distinguished the holding in *Walton* by clearly misinterpreting the Arizona weighing equation, stating that under the Arizona weighing equation, "[t]he sentencer must also determine whether those mitigating factors are outweighed by the aggravating factors . . . or, stated alternatively, are sufficient to call for leniency." 814 P.2d at 846. As noted above, the Arizona weighing equation is in reality, the opposite. See *Walton*, 497 U.S. at 687 (Blackmun, J., dissenting); *State v. Gretzler*, 135 Ariz. at 53-55. This misconstruction allowed the *Young* court to lump *Walton*'s approval of the Arizona weighing equation in with the Supreme Court's approval of the weighing equations in *Blystone* and *Boyde* to conclude that *Walton* did not address the equipoise question. See 814 P.2d at 846. In the end, however, the *Young* court appeared unsure of its construction of the United States Constitution and instead held that even

if its determination that the weighing equation violated the United States Constitution was incorrect, the weighing equation would violate the Colorado Constitution. 814 P.2d at 845-46.

This, then, is the sum total of authority for the proposition that a weighing equation which mandates death when aggravating and mitigating factors are in equipoise violates the Eighth Amendment: A Ninth Circuit case which the Ninth Circuit has recognized as having been abrogated by the United States Supreme Court; a federal district court case based entirely on that Ninth Circuit Court case; a New Jersey state case which predates any United States Supreme Court discussion of the issue and which is primarily based not on the United States Constitution but instead on New Jersey's "traditional concern for the rights of defendants charged with capital offenses," and a Colorado state case based primarily on the Colorado state constitution. This authority pales in comparison to that of a decision of the United States Supreme Court expressly authorizing such a weighing equation, see *Walton v. Arizona*, 497 U.S. 639, and the repeated assertions of the United States Supreme Court that no specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. *Buchanan v. Angelone*, 522 U.S. 269, 276, 139 L. Ed. 2d 702, 118 S. Ct. 757 (1998). See *Walton*, 497 U.S. at 651-52; *Boyde v. California*, 494 U.S. at 377; *Blystone v. Pennsylvania*, 494 U.S. at 309.

There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating circumstances to be exactly equal in weight is somehow "unfair." While it is certainly within the province of this court to interpret the Eighth Amendment, we cannot do so in a vacuum. We cannot simply rely on our own inchoate feelings, but instead have a duty to examine, analyze, and apply the United States Supreme Court's jurisprudence on the matter. This is especially true in cases



such as the one before us where the majority of the court holds that a statute enacted by the legislature violates the Constitution on its face and is, therefore, invalid. We have held:

"The constitutionality of a statute is presumed, all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. . . . Statutes are not stricken down unless the infringement of the superior law is clear beyond substantial doubt." *State v. Groschang*, 272 Kan. 652, 668, 36 P.3d 231 (2001).

This is not to say that we should not strike down statutes which clearly infringe on the Constitution. However, when a court takes such a step it is imperative that a clearly articulated reason be given and that it be explained how that reason fits into the United States Supreme Court's jurisprudence on the issue. The cases examined compel the opposite conclusion from the majority's decision.

It is ironic that the majority appears more than ready to adopt my dissenting opinion in *Kleypas* on the question of whether the statute could be saved if it did in fact violate the Constitution. That part of the dissent was written in an unsuccessful effort to compel the *Kleypas* majority to squarely address the question of the statute's constitutionality and to articulate its reasoning as to why K.S.A. 21-4624(e) violates the Constitution. It is unfortunate that the majority rushes to give me perhaps too much credit for my dissenting opinion that the statute, if unconstitutional, is unconstitutional on its face, but completely disregards the overriding theme of my dissent, which is that the statute is not unconstitutional at all. See *Kleypas*, 272 Kan. at 1124 (Davis, J., dissenting).

I respectfully dissent from the majority opinion because I conclude that K.S.A. 21-4624(e), as passed by the Kansas Legislature in 1994, was and is today constitutional under the Eighth Amendment to the United States Constitution.

McFARLAND, C.J. and NUSS, J. join in the foregoing dissenting opinion.

NUSS, J., dissenting: I join Justice Davis for the reasons discussed in his dissenting opinion. I write a separate dissent primarily to elaborate upon one of his reasons: the controlling authority, over the instant case's issue of death at equipoise, of *Walton v. Arizona*, 497 U.S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990), *overruled on other grounds Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002).

Ever since the United States Supreme Court's decision in *Furman v. Georgia*, 408 U.S. 238, 33 L. Ed. 2d 346, 92 S. Ct. 2726 (1972), many state legislatures have struggled to fashion death penalty statutes which the Supreme Court will not strike as unconstitutional. Their paths have been neither smooth nor straight because the Court's directions, and often its requirements, certainly have been less than clear and at least arguably less than consistent. Many legislatures could justifiably consider the constitutionality target in death penalty jurisprudence as a moving one. As described by one of the Supreme Court's own members, "[f]or state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow." *Walton v. Arizona*, 497 U.S. at 668. (Scalia, J., concurring).

The Supreme Court did, however, bestow constitutional passing grades on state death penalty statutes in three cases in 1990: *Blystone v. Pennsylvania*, 494 U.S. 299, 108 L. Ed. 2d 255, 110 S. Ct. 1078 (1990); *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990); and *Walton*. As a result, if a state legislature can fashion a death penalty statute identical to any of those which were approved in these cases, then its statute should also receive a constitutional passing grade. The Kansas death penalty



statute, K.S.A. 21-4624, is functionally identical on the issue of death at equipoise to the Arizona death penalty statute approved in *Walton*. Accordingly, *Walton* controls. To demonstrate that *Walton* controls, I find it necessary to set forth below much of its specific language.

WALTON

There is no question that the issue of death at equipoise was squarely before the *Walton* Court. As Justice Davis' dissent explains, the Supreme Court granted certiorari to resolve the conflict between the Arizona Supreme Court, which held its state death penalty statute to be constitutional, and the United States Court of Appeals for the Ninth Circuit, which held the statute to be unconstitutional "for the reasons submitted by *Walton* in this case, see *Adamson v. Ricketts*, 865 F.2d 1011 (1988) (en banc)." 497 U.S. at 647.

*Petitioner Walton's brief*

To identify "the reasons submitted by Walton in this case," one must consider his brief:

Petitioner Walton began by clearly stating his second "Question Presented" on p. 1 of his brief as follows:

"Whether Arizona's capital sentencing statute violates the Eighth and Fourteenth Amendments by:

"a) requiring that death be imposed if the defendant fails to prove the existence of *mitigating circumstances sufficiently substantial to call for leniency*; and

"b) precluding the sentencer from considering mitigating circumstances unless the defendant has established their existence by a preponderance of the evidence?" (Emphasis added.)

Next, petitioner *Walton* articulated the effect of this italicized statutory language as interpreted by both the Arizona Supreme Court and the Ninth Circuit on p. 33 of his brief. In the section titled "The Statutory Presumption in Favor of Death," he argued:

"Not only must Arizona capital defendants establish that particular mitigating circumstances exist, but they must show that these circumstances are 'sufficiently substantial to call for leniency.' . . . This statutory language tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless – as the Arizona Supreme Court put it in Petitioner's case – *there are 'out-weighing mitigating factors.*'" (citing *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 [1989]).

At p. 33, Walton then repeated the italicized statutory language's effect. He also clearly argued why he considered death at equipoise, which is connected to his argument regarding the statutory presumption in favor of death, to be violative of his constitutional rights:

"In *Adamson v. Ricketts*, [865 F.2d 1011 (9th Cir. 1988)], the Ninth Circuit succinctly described this system:

'Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, *but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s)* . . . The relevant clause in the statute – "sufficiently substantial to call for leniency" – thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance. 865 F.2d at 1041-2 (footnotes omitted)." (Emphasis added.)

Finally, petitioner *Walton* again clearly presented the issue of death at equipoise on pp. 36-37 of his brief. In the section titled "The Removal of Sentencing Discretion," he argued:

"The Arizona statute is explicitly mandatory: it provides that the sentencer 'shall' impose a death sentence whenever a single aggravating circumstance is found and the defendant fails to meet his statutory burdens of proof. . . .

. . . .



". . . While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because *in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence. . . . Adamson v. Ricketts, supra,* 865 F.2d at 1043 (footnotes omitted)." (Emphasis added.)

*Plurality Opinion*

Justice White, writing for the plurality, addressed the two subparts of petitioner Walton's second "Question Presented" in Sections III and IV of the opinion. See 497 U.S. at 649-652. In Section III, he expressly rejected Walton's contention "that the Arizona statute violates the Eighth and Fourteenth Amendments because it imposes on defendants the burden of establishing, by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 649.

Then in Section IV of the plurality opinion, Justice White expressly rejected Walton's other contention that

"because [Arizona statute] § 13-703(E) provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." 497 U.S. at 651.

As support for rejecting Walton's latter argument, Justice White looked to two capital cases decided by the Court only 4 months earlier:

"Our recent decisions in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990) and *Boyde v. California*, 494 U.S. 370 (1990), foreclose this submission. . . . We pointed out [in *Blystone*] that '[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant

mitigating evidence.'" 497 U.S. at 651-52 (citing *Blystone*, 494 U.S. at 307).

Justice White then proceeded to explain why *Boyde v. California* in particular supported the plurality's analysis and its rejection of Walton's argument:

"Similarly, *Boyde v. California*, *supra*, upheld a pattern jury instruction which stated that '[i]f you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death.' See 494 U.S. at 374. . . . The Court specifically noted that 'there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and *States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty.*'" *Id.*, at 377 (quoting *Franklin v. Lynaugh*, 487 U.S. 164 (1988) (plurality opinion)). Walton's arguments in this case are no more persuasive than those made in *Blystone* and *Boyde*." (Emphasis added.) 497 U.S. at 652.

Justice Scalia joined White and the other three justices of this plurality, Chief Justice Rehnquist, Justice O'Connor, and Justice Kennedy, to form a majority which held Arizona's death penalty sentencing procedures were constitutional and affirmed Walton's death sentence which had been imposed under those procedures.

*Dissenting Opinion*

While Justice White did not use the word "equipoise" or expressly signal the concept, *i.e.*, specifically referencing "situations where the mitigating and aggravating circumstances are in balance," his four dissenting colleagues certainly acknowledged that the issue of death at equipoise was directly presented to them. Justice Blackmun, writing for himself and fellow dissenters Justices Brennan, Marshall, and Stevens, not only addressed this specific issue in Section B of the dissenting opinion at 497 U.S. at 686, but actually began his analysis with death at equipoise:



"*I also believe that the Constitution forbids the State of Arizona to place upon the capital defendant the burden of proving mitigating circumstances that are 'sufficiently substantial to call for leniency.*' Ariz. Rev. Stat. Ann. § 13-703(E) (1989). Once an aggravating circumstance has been established, the Arizona statute mandates that death is to be deemed the appropriate penalty unless the defendant proves otherwise. That statutory provision, in my view, establishes a 'presumption of death' in violation of the Eighth Amendment. [Citing, *inter alia*, *Adamson v. Ricketts*, 865 F.2d 1011, 1041 (9th Cir. 1988).]

"The Arizona Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' *only if the mitigating factors 'outweigh' those in aggravation. . . . If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment.* The assertion that a sentence of death may be imposed *in such a case* runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.' [Citation omitted.]" (Emphasis added.) 497 U.S. at 686-87 (Blackmun, J., dissenting).

Not only did the four dissenters acknowledge that death at equipoise was directly presented to them, but more important, they also unequivocally interpreted Justice White's plurality opinion as having disposed of the issue. Specifically, the dissenters opined that the plurality's reliance on *Blystone v. Pennsylvania* and *Boyde v. California* was misplaced because those states' death penalty statutes were distinguishable from Arizona's on this very issue:

"The statutes upheld in those cases provided that the death penalty would be imposed 'only after a determination that *the aggravating circumstances outweigh the mitigating circumstances* present in the particular crime committed by the particular defendant, or that there are no such mitigating

circumstances.' *Blystone*, 494 U.S. at 305. *In neither Boyde nor Blystone did the challenged statute require a capital sentence when aggravating and mitigating factors are evenly balanced.* Those decisions simply do not speak to the issue posed by the Arizona statute: whether the State permissibly may place upon the capital defendant the burden of demonstrating that a sentence of death is *not* appropriate." (Emphasis added.) 497 U.S. at 687-88 (Blackmun, J., dissenting).

The dissenters' very next paragraph clearly continued their analysis of the issue of death at equipoise as follows:

"The plurality does not attempt to explain *why Arizona may require a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced.* Indeed, the plurality does not even acknowledge that this is the dispositive question. Instead, it offers only a conclusory assertion: 'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.'" 497 U.S. at 688 (Blackmun, J., dissenting).

The dissenters not only denounced the plurality's tacit approval of the concept that "in death, the tie goes to the State." They also worried that the plurality's lack of a "limiting principle" would allow states to place an even greater burden of proof upon the defendant fighting to avoid a sentence of death:

"One searches in vain for any hint of a limiting principle. May a State require that the death penalty be imposed whenever an aggravating factor is established and mitigating circumstances do not '*substantially* outweigh' those in aggravation? May a state statute provide that a death sentence is presumptively appropriate whenever an



aggravating circumstance is proved, and that the presumption can be rebutted only by a showing that mitigating circumstances are '*extraordinarily great*'? These formulations would appear to satisfy the plurality's test; viz., that the State is required to establish an aggravating circumstance, and no mitigating evidence is excluded from the sentencer's consideration." (Emphasis added.) 497 U.S. at 688 (Blackmun, J., dissenting).

The dissenters also observed that the plurality's approval of this concept in the Arizona death penalty statute "appears to rest upon an analogy between mitigating evidence in capital sentencing and affirmative defenses in noncapital cases." 497 U.S. at 689. The dissenters then left no doubt that they believed the plurality incorrectly permitted the tie to go to the State. They ended their analysis by "conclud[ing] that the Constitution bars Arizona from placing upon a capital defendant the burden of proving that mitigating circumstances are 'sufficiently substantial to call for leniency'" a phrase that the dissenters admitted was interpreted by the Arizona Supreme Court as requiring the defendant to prove his mitigating factors outweighed his aggravating factors. 497 U.S. at 690.

In my view, the four dissenters were correct in their interpretation of their colleagues' plurality opinion. The plurality conceivably required a capital defendant to prove more than his or her mitigating factors "outweighed" his or her aggravating factors; rather, *e.g.*, that they "*substantially* outweighed" them. Today, however, we need not try to determine the outer reaches of the plurality opinion regarding the defendant's burden of proof; rather, we need only acknowledge that death at equipoise is within that opinion's constitutional boundaries.

*Controlling cases cited in Walton*

That said, the part of the plurality opinion which most persuades me that death at equipoise is tacitly approved is as observed by the dissent Justice White's drawing an analogy

between mitigating evidence and affirmative defenses. In particular, he cited two of the Supreme Court's capital decisions which placed the burden on the defendant to prove self-defense or insanity or else be put to death: *Martin v. Ohio*, 480 U.S. 228, 94 L. Ed. 2d 267, 107 S. Ct. 1098 (1987); and *Leland v. Oregon*, 343 U.S. 790, 96 L. Ed. 1302, 72 S. Ct. 1002 (1952). He additionally cited two non-capital murder cases: *Patterson v. New York*, 432 U.S. 197, 53 L. Ed. 2d 281, 97 S. Ct. 2319 (1977); and *Rivera v. Delaware*, 429 U.S. 877, 50 L. Ed. 2d 160, 97 S. Ct. 226 (1976), which also placed the burden on the defendant to prove an affirmative defense. As Justice White concluded:

"*The basic principle of these cases controls the result in this case.* So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." (Emphasis added.) 497 U.S. at 650.

In one of the cited cases, *Leland v. Oregon*, 343 U.S. 790, the Court upheld a requirement that the defense of insanity be proved beyond a reasonable doubt by the defendant who had been sentenced to death. Next, in *Rivera v. Delaware*, 429 U.S. 877, though the court dismissed the appeal for want of a substantial federal question, the case had precedential value: a defendant convicted of second-degree murder who raised an insanity defense was required to prove his mental illness or defect by a preponderance of the evidence.

One year after *Rivera*, the Court stated in the second-degree murder case of *Patterson v. New York*, 432 U.S. at 207, that it was "unwilling to reconsider *Leland* and *Rivera*" and upheld a requirement that the affirmative defense of extreme emotional disturbance be proved by a preponderance of the evidence.



Finally, in *Martin v. Ohio*, 480 U.S. at 236, the Court observed: "We have had the opportunity to depart from *Leland v. Oregon*, . . . but have refused to do so," citing *Rivera v. Delaware*. Additionally: "These cases were important to the *Patterson* decision and they, along with *Patterson*, are authority for our decision today." 480 U.S. at 236. Based upon these precedents, the *Martin* Court upheld the Ohio practice of imposing on a capital defendant the burden of proving by a preponderance of the evidence that he or she was acting in self-defense when he or she committed a murder.

It is additionally persuasive to me that two of these four murder cases cited by Justice White in the *Walton* plurality, *Patterson v. New York* and *Martin v. Ohio*, were also authored by him. Moreover, *Martin* not only affirmed the *Leland* line of cases, but it also was written only 3 years before White wrote the plurality opinion in *Walton*. (Of the other two cases cited as authority for *Martin*'s holding, *Leland v. Oregon* predated all the members of the *Walton* Court, and *Rivera v. Delaware* had no author due to its dismissal on jurisdictional grounds.)

Accordingly, it is my opinion that Justice White knew exactly what these four cases stood for and therefore knew perhaps better than his colleagues exactly why these cases supported his opinion for the plurality in *Walton*. In short, since the Court had repeatedly approved requiring murder defendants, particularly two capital murder defendants, to prove their affirmative defenses by at least a preponderance of the evidence, it was entirely consistent for the Court to require defendant Walton to prove, essentially by a preponderance of the evidence, why he should not be sentenced to death, *i.e.*, to "prov[e] mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 650. Furthermore, the Court's reliance upon *Leland*, whose capital defendant was required to prove his affirmative defense by the even higher standard of beyond a reasonable doubt, clearly suggests the Court would approve some

capital defendant sentencing burdens even greater than those placed upon petitioner Walton.

The majority in the instant case, however, much like the majority in *Kleypas* whose reasoning it affirms in holding K.S.A. 21-4624(e) unconstitutional as written does not make any attempt to address these four important United States Supreme Court precedents upon which Justice White expressly relied. This omission is curious, since White's heavy reliance upon these cases as the key to the *Walton* opinion's holding could not have been stated any more clearly: "The basic principle of these cases controls the result in this case." 497 U.S. at 650. At best, the majority obliquely dismisses these four essential cases as "cases that predate *Walton*" which require analyzing "distinct statutory language" and as a result, "obviously, do not control." According to *Walton*, however, they expressly control the outcome there and should in the instant case as well.

CASE LAW INTERPRETATIONS OF WALTON

*Walton* clearly controls the issue of death at equipoise contained in the Kansas death penalty statute, K.S.A. 21-4624. Additionally persuasive, as Justice Davis points out in his dissent, are the interpretations of *Walton* by the two entities whose conflicting interpretations of the Arizona death penalty statute had to be resolved there: the Arizona Supreme Court and the Ninth Circuit Court of Appeals.

Since *Walton*, the Arizona Supreme Court has repeatedly interpreted its death penalty statute to require the defendant to prove mitigating factors which outweigh the aggravating factors in order to avoid a sentence of death. "On appeal, our task is independently to 'review the record to determine *whether any mitigating circumstances outweigh aggravating circumstances.*'" (Emphasis added.) *State v. Brewer*, 170 Ariz. 486, 504, 826 P.2d 783, cert. denied 506 U.S. 872 (1992). "We make this decision [on the death penalty sentence] after searching the entire record for error, examining the evidence establishing the presence or absence



of aggravating and mitigating circumstances, and determining *whether the latter circumstances outweigh the former when both are present.*" (Emphasis added.) *Brewer*, 170 Ariz. at 500. See *State v. Pandeli*, 200 Ariz. 365, 374, 26 P.3d 1136 (2001), *cert. granted and judgment rev'd by Ring v. Arizona*, 536 U.S. 584, 153 L. Ed. 2d 556, 122 S. Ct. 2428 (2002); *State v. Hoskins*, 199 Ariz. 127, 147, 14 P.3d 997 (2000), *cert. denied* 534 U.S. 970 (2001); *State v. Van Adams*, 194 Ariz. 408, 422, 984 P.2d 16 (1999), *cert. denied* 528 U.S. 1172 (2000); *State v. Djerf*, 191 Ariz. 583, 595, 959 P.2d 1274, *cert. denied* 525 U.S. 1024 (1998); *State v. Ysea*, 191 Ariz. 372, 375, 956 P.2d 499 (1998); *State v. Rienhardt*, 190 Ariz. 579, 592-93, 951 P.2d 454 (1997), *cert. denied* 525 U.S. 838 (1998); *State v. Thornton*, 187 Ariz. 325, 335, 929 P.2d 676 (1996), *cert. denied* 520 U.S. 1217 (1997); *State v. Gulbrandson*, 184 Ariz. 46, 72, 906 P.2d 579 (1995), *cert. denied* 518 U.S. 1022 (1996); *State v. Greenway*, 170 Ariz. 155, 170, 823 P.2d 22 (1991); *State v. Lavers*, 168 Ariz. 376, 391, 814 P.2d 333, *cert. denied* 502 U.S. 926 (1991).

Moreover, after *Walton*, Arizona has executed capital defendants under the authority of its interpretation of that statute, with 22 executions since 1992. Three of those executions occurred after the Arizona Supreme Court affirmed the defendants' death penalty sentences (post-*Walton*), and the United States Supreme Court denied their petitions for writs of certiorari. See *State v. Miller*, 186 Ariz. 314, 921 P.2d 1151 (1996), *cert. denied* 519 U.S. 1152 (1997); *State v. Ross*, 180 Ariz. 598, 886 P.2d 1354 (1994), *cert. denied* 516 U.S. 878 (1995); *State v. Brewer*, 170 Ariz. 486. One should be leery of reading too much into those denials, but one wonders: If the Supreme Court believed that Arizona was interpreting *Walton* in a way that violated a petitioner's constitutional rights, would not the Court have granted at least one petition to stop one of those three executions?

Additionally, the Arizona Supreme Court has interpreted *Walton* as rejecting the claim that its death penalty statute

contained a presumption of death, an argument closely connected to the death at equipoise argument. In *Gulbrandson*, the defendant argued that the Arizona statute was unconstitutional because "once the state has proven at least one aggravating circumstance, the statute places the burden on a defendant to prove sufficiently substantial mitigation to outweigh *the presumption of death.*" (Emphasis added.) *Gulbrandson*, 184 Ariz. at 72. The Arizona Supreme Court responded: "This argument has been rejected," citing *Walton*, 497 U.S. at 650. *Gulbrandson*, 184 Ariz. at 72. See *State v. Salazar*, 173 Ariz. 399, 411, 844 P.2d 566 (1992), *cert. denied* 509 U.S. 912 (1993); *State v. Brewer*, 170 Ariz. at 497; *State v. Greenway*, 170 Ariz. at 160.

Most tellingly to me, the Ninth Circuit, which had declared the Arizona death penalty statute unconstitutional, and upon which the *Walton* dissent heavily relied to opine that the statute establishes a presumption of death in violation of the Eighth Amendment, also interpreted *Walton* as rejecting this argument. In *Richmond v. Lewis*, 948 F.2d 1473, 1481 (9th Cir. 1992), the defendant had argued "that the Arizona statute creates an unconstitutional presumption that death is the proper sentence." The Ninth Circuit responded: "The Supreme Court's recent decision in *Walton v. Arizona* specifically addressed and rejected" this contention. *Richmond*, 948 F.2d at 1481. See *Campbell v. Wood*, 18 F.3d 662, 675 (9th Cir.), *cert. denied* 511 U.S. 1119 (1994); *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), *cert. denied* 505 U.S. 1213 (1992); *Smith v. McCormick*, 914 F.2d 1153, 1170 (9th Cir. 1990).

Furthermore, I observe that the Kansas Supreme Court also apparently interpreted *Walton* in this fashion in *State v. Spain*, 269 Kan. 54, 4 P.3d 621 (2000) just 1 year before *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001) when it stated:

"In *Walton*, five justices agreed the Arizona death penalty statute did not create an unconstitutional presumption in



favor of the death penalty. The statute at issue in *Walton* required imposition of the sentence of death if any aggravating circumstances were established and there were '"no mitigating circumstances sufficiently substantial"' to warrant leniency. 497 U.S. at 644 (quoting Ariz. Rev. Stat. Ann. § 13-703[E] [1989]). Although the language chosen by the Arizona legislature does not include the terms 'weigh' or 'outweigh,' what the statute prescribes is a weighing process that results in imposition of the death penalty if the mitigating circumstances are not of sufficient weight *to tip the balance toward leniency.*'" (Emphasis added.) 269 Kan. at 59.

I interpret our phrase "to tip the balance toward leniency" as requiring more mitigating circumstances than aggravating circumstances, *i.e.*, a tie goes to the State.

Finally, I observe, again with Justice Davis, that the Supreme Court of Idaho interpreted *Walton* the same way. In *State v. Hoffman*, 123 Idaho 638, 851 P.2d 934 (1993), *cert. denied* 511 U.S. 1012 (1994), the defendant argued that part of Idaho's death penalty statute, like Marsh argues about part of Kansas' statute, was "unconstitutional because it requires a defendant to provide mitigating circumstances which outweigh any statutory aggravating circumstance found." 123 Idaho at 646-47. The challenged portion of the statute, Idaho Code § 19-2515(c)(1987), is very similar to K.S.A. 21-4624(e). It stated:

"Where a person is convicted of an offense which may be punishable by death, a sentence of death shall not be imposed unless the court finds at least one (1) statutory aggravating circumstance. *Where the court finds a statutory aggravating circumstance the court shall sentence the defendant to death unless the court finds that mitigating circumstances which may be presented outweigh the gravity of any aggravating circumstance found and make imposition of death unjust.*" (Emphasis added.)

Compare K.S.A. 21-4624(e):

"If, by unanimous vote, the jury finds beyond a reasonable doubt that *one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist, and further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death*; otherwise, the defendant shall be sentenced as provided by law." (Emphasis added.)

The Idaho Supreme Court quickly dispatched Mr. Hoffman's constitutional argument because

"[t]his scheme was found to be constitutional in *Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990). In that case, the Supreme Court held:

'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency. 497 U.S. at 650, 110 S. Ct. at 3055.'

"Because the State was required to prove every element of the offense charged, including the statutory aggravating circumstances, the burden placed on Hoffman by operation of [Idaho Code] § 19-2515(c) did not violate his constitutional rights. *Walton v. Arizona, supra*." 123 Idaho at 647.

For the same reasons, Marsh's argument that K.S.A. 21-4624(e) is facially unconstitutional because it mandates death at equipoise should be quickly dispatched by our court.

In summary, outside of the Colorado Supreme Court's decision in *People v. Young*, 814 P.2d 834 (Colo. 1991) (which I agree with Justice Davis misreads the Arizona sentencing scheme and relies upon the Colorado Constitution), and *Hulsey v. Sargent*, 868 F. Supp. 1090 (E.D. Ark. 1993) (which does not mention *Walton* but relies



upon *Adamson*, which the Ninth Circuit admits was abrogated by *Walton*), I have been unable to find any other court since the *Walton* decision was released in 1990 that agrees with the position of the four justices in the majority in the instant case.

In conclusion, this court is bound by the United States Supreme Court's plurality holding in *Walton* until such time as that Court as warned by Justice Scalia in his concurring opinion in that case changes its mind. And *Walton* mandates that the death at equipoise concept contained in our death penalty statute, K.S.A. 21-4624, is constitutional.

McFARLAND, C.J., dissenting: I respectfully dissent. I agree with Justice Davis that the weighing equation contained in K.S.A. 21-4624(e) is constitutional as written. If we were writing on a clean slate, there would be no reason for me to further write in dissent; however, such is not the case. In *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), the majority opinion construed K.S.A. 21-4624(e) to be constitutional; I joined in the dissent of Justice Davis, as did Justice Abbott in a separate dissenting opinion, concluding the statute was constitutional as written. Thus, the *Kleypas* court unanimously upheld the constitutionality of K.S.A. 21-4624(e). Now, without any intervening change in substantive law, the majority opinion overrules *Kleypas*, not because the statute as construed is unconstitutional, but because the majority decides the *Kleypas* court exceeded its judicial authority in construing the statute. *Kleypas* was a 4 to 3 decision, consisting of a majority opinion and two written dissents. None of the three opinions took the position that the Kansas death penalty law must be struck down as constitutionally impermissible. The majority opinion upheld the law with an extremely minor judicial construction relative to equipoise, with the three dissenters upholding the law as written. In the case before us, another 4 to 3 decision, the majority concludes the death penalty is fatally flawed and rejects the majority's action in *Kleypas* which remedied the perceived equipoise flaw. There has been no change in

relevant constitutional law as expressed by the United States Supreme Court. The only change has been the composition of the Kansas Supreme Court occasioned by the retirements of Justices Larson, Six, Lockett, and Abbott. While fidelity to the doctrine of stare decisis is not an "inexorable command," we should be highly skeptical of reversing an earlier decision where nothing has changed except the composition of the court. See *Payne v. Tennessee*, 501 U.S. 808, 848, 115 L. Ed. 2d 720, 111 S. Ct. 2597, *reh. denied* 501 U.S. 1277 (1991) (Marshall J., dissenting).

The importance of the doctrine of stare decisis to our legal system has been often stated. The United States Supreme Court has recognized that, although not an "inexorable command," "[s]tare decisis is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. at 827. Stare decisis is:

"the means by which [the Court] ensure[s] that the law will not merely change erratically, but will develop in a principled and intelligible fashion. [Stare decisis] permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact." *Vasquez v. Hillery*, 474 U.S. 254, 265-66, 88 L. Ed. 2d 598, 106 S. Ct. 617 (1986).

See also *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 854, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992) (stating that the "very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable"); *Thornburgh v. American Coll. of Obst. & Gyn.*, 476 U.S. 747, 786-87, 90 L. Ed. 2d 779, 106 S. Ct. 2169 (1986) (White, J., dissenting) (stating that "[t]he rule of



stare decisis is essential if case-by-case judicial decisionmaking is to be reconciled with the principle of the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will, with arbitrary and unpredictable results").

We have similarly acknowledged the importance of stare decisis in our decisions, stating:

"once a point of law has been established by a court, that point of law will generally be followed by the same court and all courts of lower rank in subsequent cases where the same legal issue is raised. Stare decisis operates to promote system-wide stability and continuity by ensuring the survival of decisions that have been previously approved by this court. . . . The application of stare decisis ensures stability and continuity demonstrating a continuing legitimacy of judicial review." *Samsel v. Wheeler Transport Services, Inc.*, 246 Kan. 336, 356, 789 P.2d 541 (1990), disapproved on other grounds, *Bair v. Peck*, 248 Kan. 824, 844, 811 P.2d 1176 (1991).

The majority opinion pays lip service to the concept of stare decisis, but hastily disregards it, stating:

"Stare decisis is designed to protect well-settled and sound case law from precipitous or impulsive changes. It is not designed to insulate a questionable constitutional rule from thoughtful critique and, when called for, abandonment. This is especially true in a situation like the one facing us here. *Kleypas*' application of the avoidance doctrine was not fully vetted. It is young and previously untested. Its rewriting of K.S.A. 21-4624(e) was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature." 278 Kan. at ___.

The *Kleypas* appeal was heard in December 2000. In the preceding 6 months, an unprecedented number of hours was spent by many court research attorneys preparing the lengthiest research memorandum I have ever seen. Fifty-one

issues relating to the validity of the conviction, sentence, and the constitutionality of the Kansas death penalty law as a whole were exhaustively considered by this court. At the end of a year of examination and deliberation, on December 28, 2001, we issued a 338-page ruling in which we concluded that the Kansas death penalty law, and specifically the weighing equation contained in K.S.A. 21-4624(e), was constitutional. Far more time was spent on this case by the justices, in general, and on the weighing issue, in particular, than any other case since I became a member of this court in 1977. The majority opinion brushes off the majority holding in *Kleypas*, stating the issue was not "fully vetted," cannot withstand "thoughtful critique," and is "clearly erroneous."

While it is true that stare decisis need not be an "inexorable command," any departure from it should be "informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case." See *Planned Parenthood v. Casey*, 505 U.S. at 854. These considerations include: (1) whether the decision sought to be overturned has proven to be intolerable simply in defying practical "workability"; (2) whether the decision is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; (3) whether related principles of law have so far developed as to have left the rule established by the old decision no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or have come to be seen so differently, as to have robbed the rule established by the old decision of significant application or justification. 505 U.S. at 854-55.

There can be no serious contention that our decision in *Kleypas* construing K.S.A. 21-4624(e) in a constitutional manner has proven to be unworkable. From the beginning, the perceived constitutional problem with the weighing equation was slight: the weighing equation mandated death



rather than a life sentence in the extremely unlikely event that the jury determined the aggravating and mitigating circumstances to be in perfect balance. It is almost impossible to conceive as to how this event would come about in a real, as opposed to hypothetical, situation. In construing the statute so as to mandate life in that circumstance, we avoided the possibility that the entire Kansas death penalty law would be rendered invalid because of its application to an artificial situation that would almost certainly never arise. There is no real question that the statute, as construed by our decision in *Kleypas*, is constitutional.

This leads us to the question of whether our decision in *Kleypas* has been "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation." See *Casey*, 505 U.S. at 854. "The inquiry into reliance counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application." 505 U.S. at 855. From the majority opinion, one might think that there could have been no reliance on our decision in *Kleypas*, inasmuch as the majority characterizes it as "young and previously untested." 278 Kan. at ___. However, this ignores the very real reliance that the legislature, courts, and the people of Kansas have placed on our decision.

Whatever one's opinion on the moral validity of the death penalty, the fact remains that in 1994, the legislature, acting on behalf of the people of Kansas, passed into law an act providing for the death penalty as a possible punishment for a narrow, clearly defined group of intentional and premeditated murders. See L. 1994, ch. 252. *State v. Kleypas* was the first case to consider the validity of that death penalty, and our decision was eagerly awaited by the people of Kansas as a test of whether the death penalty that the legislature had enacted would pass constitutional muster.

Through our opinion in *Kleypas*, we told the legislature, and by extension the people of Kansas, that the death penalty law it had enacted was constitutional as construed by this court. The legislature had the right to rely on our construction of the weighing equation in K.S.A. 21-4624(e), and concluded that no further action on its part was necessary in order for Kansas to have a constitutional death penalty. In reliance on our assurances that the Kansas death penalty law was constitutional as construed, a substantial number of death penalty proceedings have been tried in this state, resulting in the imposition of five death sentences. A report by the Legislative Division of Post Audit estimated the taxpayers' costs of the post-*Kleypas* cases included in its study in the millions of dollars. See Kansas Legislative Post Audit Committee Performance Audit Report, Costs Incurred for Death Penalty Cases, Appendix D (December 2003).

According to the majority, what this court should have done in *Kleypas* was declare the statute unconstitutional on its face. The majority therefore believes that is the appropriate remedy here. However, the situation is not the same here as it was in *Kleypas*. Where this court has not spoken on the constitutionality of a statute, all of those affected by it are on notice that its constitutionality has not been tested, and that it might be found wanting. However, where this court has addressed the precise statute involved, on the precise point articulated, and found the statute to be constitutional, persons should be entitled to rely on that decision, not see it overturned the very next time a case involving the same issue comes before this court. This reliance militates against haphazardly discarding our decision in *Kleypas*.

Certainly, there can be no argument that "related principles of law have so far developed as to have left the old rule" established in *Kleypas* "no more than a remnant of abandoned doctrine." See *Casey*, 505 U.S. at 855. Our decision in *Kleypas* is a mere 3 years old, and nothing this court has said in the interim has evidenced our intention to abandon its underlying principles. Similarly, there has been



nothing in the jurisprudence of the United States Supreme Court during that time to show that our decision in *Kleypas* was incorrect.

Nor have "facts . . . so changed, or come to be seen so differently, as to have robbed the old rule [established by the *Kleypas* decision] of significant application or justification." See *Planned Parenthood v. Casey*, 505 U.S. at 855. There has been no significant change in the factual underpinnings of our *Kleypas* decision, and no change in facts that would cause its central holding to be rendered obsolete.

The majority's decision today, by the barest of margins, discards our 3-year old decision in *Kleypas*, not because that decision has become unworkable, or the laws or facts underpinning it have changed, or a United States Supreme Court decision mandates it, but simply because this new majority has the power to do so. And to what end? This is not a situation where the continuation of an allegedly erroneous decision has the potential to work great hardship on the rights of individuals. Our construction of the statute in *Kleypas* does not adversely affect the rights of those charged with capital murder; rather, it actually provides greater protection. There is no question that the weighing equation in K.S.A. 21-4624(e), as construed by our decision in *Kleypas*, is constitutional. Thus, there is now no possibility that any defendant will be sentenced to death where the aggravating and mitigating circumstances are in equipoise. This court's decision in *Kleypas* creates no prejudice to any defendant. Nevertheless, the majority's decision herein has the anomalous consequence that death-sentence defendants: Reginald D. Carr, Jonathan D. Carr, John Robinson, Sr., Douglas Belt, and Michael L. Marsh, II (defendant herein), will have their death sentences swept away, despite the fact that the equipoise factor which so concerns the majority was not present. The death penalty proceedings in each of these five cases, except *Marsh*, were tried post-*Kleypas* and, thus, each of the juries was instructed that, pursuant to our decision in *Kleypas*, the aggravating factors were required to

outweigh the mitigating factors for death to be imposed, and each jury so found.

The majority reasons that our decision in *Kleypas* must be overruled in order to avoid encroaching upon the power of the legislature. One might assume that, had the legislature viewed our decision as an encroachment, there might have been an outcry at the time the decision was handed down. Yet, nothing of the sort occurred.

It is ironic that the majority, in its professed desire to avoid usurping the power of the legislature, does so by frustrating the legislature's clear intent to pass a constitutional death penalty. There is no indication that the legislature, in passing the Kansas death penalty law, was particularly concerned that the sentence be death in the event that the aggravating and mitigating circumstances were exactly equal. As Justice Davis has shown in his dissent, such an "equipoise" event is extremely unlikely to arise outside the realm of hypothetical situations that are more the province of law professors than judges. By invalidating the Kansas death penalty law on the basis of its application to a technical event that is almost certain never to arise in the real world, the majority opinion thwarts the intention of the legislature, ostensibly, in order to pay tribute to it.

The only currency and legitimacy this court possesses is the confidence of the public that we will decide cases based on the consistent application of the law, rather than on the proclivities of individual court members. Attorneys, trial courts, and the public have the right to know that a point of law, once settled, will remain the settled law of the state and not be overturned every time the composition of the court changes. Our fidelity to the doctrine of stare decisis need not be absolute, but we should not abandon our prior decisions without a compelling reason to do so. See *United States v. International Business Machines Corp.*, 517 U.S. 843, 856, 135 L. Ed. 2d 124, 116 S. Ct. 1793 (1996). No compelling



reason has been shown herein and, as a result, I believe the majority opinion is a breach of that fidelity.

I joined the dissent of Justice Davis in *Kleypas* because I concluded as he did that the weighing equation was constitutional as enacted. I still so believe and am joining his dissent herein on that issue. In *Kleypas*, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law is, in my opinion, wholly inappropriate and unjustified, and I dissent therefrom.

**IN THE SUPREME COURT**
**OF THE STATE OF KANSAS**

***** FLAT-FILE-COPY *****

CASE NO. 98-81135-5

STATE OF KANSAS,
Appellee,

v.

MICHAEL LEE MARSH, II,
Appellant.

You are hereby notified of the following action taken by the Court:

Motion for Rehearing or Modification by State of Kansas.

Considered by the Court and denied. Response noted.

DATE: 02/02/2005.

Carol G. Green
Clerk

**Copies to Counsel**



**SUPREME COURT OF KANSAS.**

**STATE OF KANSAS,**
**Appellee,**
**v.**
**GARY W. KLEYPAS,**
**Appellant.**

No. 80,920.

Decided December 28, 2001

**SYLLABUS BY THE COURT**

1. Evidence of a defendant's mental disease or defect excluding criminal responsibility is not admissible at a trial unless the defendant serves upon the prosecuting attorney and files with the court a written notice of such defendant's intention to assert the defense that the defendant, as a result of mental disease or defect, lacked the mental state required as an element of the offense charged. K.S.A. 22-3219. However, insanity and voluntary intoxication are two separate defenses. No notice of an insanity defense is required where the evidence points only to a temporary mental state negating specific intent caused by the voluntary consumption of alcohol.

2. Factors to be considered in determining whether a confession is voluntary include: (1) the accused's mental condition; (2) the manner and duration of the interrogation; (3) the ability of the accused on request to communicate with the outside world; (4) the accused's age, intellect, and background; and (5) the fairness of the officers in conducting the investigation.

3. Voluntariness of a confession is determined from the totality of the circumstances and where a trial court conducts a full prehearing on the admissibility of extrajudicial statements by the accused, determines the statements were

freely and voluntarily given, and admits the statements into evidence at trial, appellate courts do not attempt to reweigh the evidence and accept that determination if supported by substantial competent evidence.

4. When a suspect makes a statement which may be ambiguous as to whether the suspect is asserting a right to remain silent, the interrogator may, but is not required to, ask questions to clarify and in any event may continue the questioning.

5. When the facts material to a decision of the court on a motion to suppress evidence are not in dispute, the question of whether to suppress becomes a question of law. An appellate court's scope of review on questions of law is unlimited.

6. It is constitutionally required that a search warrant shall particularly describe the place to be searched and items to be seized. General or blanket warrants which give the executing officers a roving commission to search where they choose are forbidden. The purpose of the constitutional requirement that search warrants particularly describe the place to be searched and the person or property to be seized is to prevent general searches and the seizure of items at the discretion of the officer executing the warrant.

7. Where the affidavit supporting a search warrant contains a particularized description of the items to be seized; the affiant and the affidavit are both present at the scene of the execution of the search warrant, even if the affiant is not the person executing the search warrant; and the officers executing the search warrant are briefed as to the items listed in the affidavit, the description in the affidavit cures a deficiency in the description of the search warrant.

8. When law enforcement officers grossly exceed the scope of a search warrant in seizing property, the particularity requirement is undermined and a valid warrant is transformed into a general warrant, thereby requiring suppression of all evidence seized under the warrant.



However, an unlawful seizure of items outside the scope of a warrant does not alone render the whole search invalid and require suppression of all evidence seized, including that lawfully taken pursuant to the warrant. Unless there was a flagrant disregard for the terms of the warrant, only the improperly seized evidence, rather than all the evidence, need be suppressed.

9. Where a defendant attacks the affidavit supporting an arrest warrant based on the omission of material information, he or she must show: (1) The omission was deliberate and (2) the omission was material. An omission is material if the original affidavit together with the previously omitted information would not support a finding of probable cause. Probable cause exists if, under the totality of circumstances as set forth in the affidavit, a fair probability exists that a crime has been committed or is being committed and that the defendant has committed it.

10. Unless a criminal defendant can show bad faith on the part of the State, the State's failure to preserve potentially useful evidence does not constitute a denial of due process of law. The question of whether the State acted in bad faith is a question of fact.

11. A criminal defendant has a right to an instruction on all lesser included offenses supported by the evidence as long as (1) the evidence, when viewed in the light most favorable to the defendant's theory, would justify a jury verdict in accord with that theory and (2) the evidence at trial does not exclude a theory of guilt on the lesser offense. An instruction on a lesser included offense is not proper if from the evidence the jury could not reasonably convict the defendant of the lesser offense.

12. The terms "in the commission of," "attempt to commit," and "flight from," as used in the felony-murder statute, are temporal requirements delineating when a killing may occur and still be part of the underlying felony.

13. In order to require an instruction on felony murder based on the theory that the killing occurred during the "flight from" an inherently dangerous felony, there must be evidence that the killing occurred during flight from the scene of the felony.

14. No party may assign as error the giving or failure to give an instruction unless he or she objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he or she objects and the grounds of his or her objection, unless the instruction or failure to give the instruction is clearly erroneous. Instructions are clearly erroneous only if the reviewing court is firmly convinced that there is a real possibility the jury would have rendered a different verdict if the trial error had not occurred.

15. In a prosecution for an attempt to commit a felony, there is no requirement that a jury be instructed as to a specific overt act the defendant is alleged to have committed.

16. When reviewing challenges to jury instructions, the instructions are to be considered together and read as a whole without isolating any one instruction. If the instructions properly and fairly state the law as applied to the facts in the case, and if the jury could not reasonably have been misled by them, the instructions do not constitute reversible error although they may be in some small way erroneous.

17. The interpretation of a statute is a question of law, and an appellate court's review is unlimited. The fundamental rule of statutory construction guiding an appellate court's determination is that the intent of the legislature governs when that intent can be ascertained from the statute. When a statute is plain and unambiguous, the appellate court must give it the effect intended by the legislature rather than determine what the law should or should not be.

18. The phrase "or any attempt thereof" modifies all the offenses contained in K.S.A. 21-3439(a)(4) and makes the intentional and premeditated killing of the victim during the



commission of or attempt to commit, or subsequent to the commission of or the attempt to commit, the offenses enumerated.

19. Reversible error normally cannot be predicated upon a complaint of misconduct by the prosecutor during closing argument where no contemporaneous objection is lodged. However, if the prosecutor's statements rise to the level of violating a defendant's right to a fair trial and deny a defendant his or her Fourteenth Amendment right to due process, reversible error occurs despite the lack of a contemporaneous objection.

20. An appellate court's analysis of the effect of a prosecutor's allegedly improper remarks in closing argument is a two-step process: First, the appellate court must determine whether the remarks were outside the considerable latitude the prosecutor is allowed in discussing the evidence. Second, the appellate court must determine whether the remarks constituted plain error; that is, whether they were so gross and flagrant as to prejudice the jury against the accused and deny him or her a fair trial. In order to find that the remarks were not so gross or flagrant, the appellate court must be able to find that when viewed in light of the record as a whole, the error had little, if any, likelihood of changing the result of the trial.

21. Factors relevant in determining whether a new trial should be granted for prosecutorial misconduct include: (1) whether the misconduct is so gross and flagrant as to deny the accused a fair trial; (2) whether the remarks show ill will on the part of the prosecutor, and (3) whether the evidence against the accused is of such a direct and overwhelming nature that it can be said that the prejudicial remarks of the prosecutor were likely to have little weight in the minds of the jurors.

22. A prosecutor has a duty to refrain from making improper, misleading, inflammatory, or irrelevant statements to the jury. This duty is heightened in capital cases.

23. Opening statements by counsel in criminal prosecutions are not evidence. They are given for the purposes of assisting the jury in understanding what each side expects its evidence at trial will establish and to advise the jury what questions will be presented for its decision. Prosecuting and defense attorneys are permitted reasonable latitude in stating to the jury the facts they propose to prove.

24. In closing argument, the prosecutor may draw reasonable inferences from the evidence but may not comment upon facts outside the evidence.

25. A juror's mental process in reaching the verdict or factors that influence the mental process cannot be inquired into for purposes of impeaching a verdict. Evidence may be received, however, as to conditions and occurrences either within or outside the jury room having a material bearing on the validity of the verdict.

26. The granting of a new trial or the recalling of a juror to inquire into alleged misconduct is a decision within the sound discretion of the trial court. Discretion is abused only where no reasonable person would agree with the actions of the trial court. Where a reasonable person would agree, an appellate court will not disturb the trial court's decision.

27. Where claims of juror misconduct directly implicate the jury's mental processes and cannot be readily verified, a trial court does not abuse its discretion by refusing to recall the jury. Where juror affidavits set forth allegations of misconduct, the truth of which can be verified, the trial court may allow inquiry and order a new trial if in its discretion juror misconduct requires a new trial.

28. The Fourteenth Amendment's guaranty of due process does not require that a prospective juror be totally ignorant of the facts and issues involved in the case. Mere existence on his or her part of a preconceived notion as to the guilt or innocence of the accused is, without more, insufficient to rebut the presumption of impartiality where the juror can lay



aside such impression or opinion and render a verdict based on the evidence presented in court.

29. The general rule is that a criminal statute must be strictly construed in favor of the accused and any reasonable doubt about its meaning is decided in favor of anyone subjected to the statute. However, this rule is subordinate to the rule that judicial interpretation must be reasonable and sensible to effect legislative design and intent.

30. Under K.S.A. 21-4624, the State is only required to provide notice that it intends to seek the death penalty upon conviction for capital murder. The State may at that time provide notice of the aggravating circumstances on which it will rely, but the State is not required to do so as long as it provides such notice within a reasonable time prior to trial. K.S.A. 21-4624 does not require the State to list the evidence it will present with regard to the aggravating circumstances as long as the State has made this evidence known to the defense prior to the sentencing proceeding.

31. Kansas law does not require a trial court to make a pretrial determination of whether there is sufficient evidence of aggravating circumstances to justify a separate penalty phase trial.

32. A criminal defendant is incompetent to stand trial when, because of a mental illness or defect, the defendant is unable to understand the nature and purpose of the proceedings against him or her or where he or she is unable to make or assist in making a defense. On appeal, a reviewing court's inquiry regarding the decision of a district court that a defendant is competent to stand trial is whether the trial court abused its discretion.

33. A party who raises the issue of a defendant's competency to stand trial has the burden of going forward with the evidence which will be measured by the preponderance of the evidence standard.

34. Amnesia alone does not provide a basis for declaring a defendant incompetent to stand trial. Amnesia is a factor to

be considered in determining whether a defendant is able to meet the test of competency to stand trial.

35. Challenges for cause are matters left to the sound discretion of the trial court which is in a better position to view the demeanor of prospective jurors during voir dire. A trial court's ruling on a challenge for cause will not be disturbed on appeal unless it is clearly erroneous or amounts to an abuse of discretion.

36. A sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding venirepersons for cause because they voiced general objections to the death penalty or expressed conscientious or religious scruples against the death penalty. However, a prospective juror may be excluded for cause because of his or her views on capital punishment where the juror's views would prevent or substantially impair the juror's ability to follow the instructions of the trial court.

37. K.S.A. 21-4624(b) does not provide for a separate jury in the penalty phase of a capital-murder case. Instead, the same jury that heard the guilt phase also hears the penalty phase. However, a defendant may voir dire the jury prior to the penalty phase in order to remove potentially prejudiced jurors for cause.

38. Allegations of judicial misconduct during trial must be decided on the particular facts and circumstances surrounding such alleged misconduct. In order to warrant or require the granting of a new trial, it must affirmatively appear that the conduct was of such nature that it prejudiced the substantial rights of the complaining party. A mere possibility of prejudice from a remark of the trial court is not sufficient to overturn a verdict or judgment. If a proper and reasonable construction will render the remark unobjectionable, an appellate court generally adopts that construction and concludes the remark is not prejudicial.

39. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court set a



framework designed to prevent the discriminatory exclusion of prospective jurors on the basis of race. Under the *Batson* framework, the defendant must first make a prima facie case showing that the prosecutor has exercised peremptory challenges on the basis of race. Once such a showing has been made, the burden shifts to the prosecutor to articulate a race-neutral reason for striking the prospective juror. The trial court must then determine whether the defendant has carried the burden of proving purposeful discrimination.

40. Parties may exercise their peremptory challenges to remove from the venire any group of persons. Appellate court review is a rational basis review under the Equal Protection Clause of the United States Constitution.

41. It is not improper for the State to use a peremptory strike to remove a prospective juror on the basis of his or her aversion to imposing the death penalty.

42. Even if trial errors are harmless when considered individually, cumulative trial errors may be so great as to require reversal of a defendant's conviction. The test is whether under the totality of circumstances cumulative error substantially prejudiced the defendant and denied him or her a fair trial.

43. In a capital case, the fundamental respect for humanity underlying the Eighth Amendment to the United States Constitution requires that the sentencer be able to consider the character and record of the individual defendant and the circumstances of the particular offenses as a constitutional, indispensable part of the process of imposing the death penalty.

44. In a capital case, the defendant must not only be allowed to present mitigating circumstances, but the sentencer must also be able to consider and give effect to the mitigating circumstances in imposing the death sentence.

45. K.S.A. 21-4624(e) is not unconstitutional on its face, but it impermissibly mandates the death penalty where the jury finds that the mitigating and aggravating circumstances are

in equipoise. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances that it finds exist.

46. This court not only has the authority but also the duty to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. To accomplish this purpose, the court may read the necessary judicial requirements into the statute.

47. The legislative intent in passing K.S.A. 21-4624 was to provide for a death sentencing scheme by which a sentence of death is imposed in a constitutional manner.

48. K.S.A. 21-4624(e) is construed to provide that if a jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exist, and further, that such aggravating circumstance or circumstances outweigh the mitigating circumstances found to exist, the defendant shall be sentenced to death. So construed, the intent of the legislature is carried out and K.S.A. 21-4624(e) does not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

49. Our holding requires that this case be remanded for resentencing to allow a jury to reconsider the imposition of the death penalty.

50. In a capital case, the standard of review on appeal as to the sufficiency of evidence regarding an aggravating circumstance is whether, after review of all the evidence, viewed in the light most favorable to the prosecution, the appellate court is convinced that a rational factfinder could have found the existence of the aggravating circumstance beyond a reasonable doubt.

51. In order for the avoid arrest aggravating factor found in K.S.A. 21-4625(5) to apply, the State must prove that a motive – not the dominant or only motive – for the murder was to avoid prosecution.



52. To pass constitutional scrutiny, an aggravating circumstance must channel the discretion of the sentencer with clear and objective standards which provide specific guidance and make possible a rational review of the process of sentencing a defendant to death. An aggravating circumstance must not apply to every defendant convicted of murder but only to a subclass of that larger group. If the sentencer could fairly conclude that an aggravating circumstance applies to every defendant convicted of murder, the circumstance is unconstitutionally vague or overbroad.

53. When the jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process; it is insufficient to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face.

54. In order to find that a murder was committed in an especially heinous, atrocious, or cruel manner so as to satisfy the aggravating circumstance contained in K.S.A. 21-4625(6), the jury must find that the perpetrator inflicted mental anguish or physical abuse before the victim's death.

55. The Kansas definition of "heinous, atrocious or cruel" narrows the class of death eligible defendants consistent with the requirements of the Eighth and Fourteenth Amendments to the United States Constitution.

56. Neither the United States Constitution, the Kansas Constitution, nor Kansas law require a proportionality analysis of a defendant's death sentence.

57. Evidence presented at a capital sentencing proceeding must be relevant to the sentence and have probative value. Evidence secured in violation of the Constitution is not admissible. The State may only introduce evidence of aggravating circumstances which were disclosed to the defendant prior to sentencing, and the defendant must be given a fair opportunity to rebut hearsay statements.

58. A capital defendant may waive trial by jury which also waives sentencing by jury. However, where a defendant pleads guilty, thus waving trial and sentencing by a jury, he or she is still subject to imposition of the death penalty by the court.

59. Section 1 of the Kansas Constitution Bill of Rights and the cruel and unusual punishment clause found in § 9 of the Kansas Constitution Bill of Rights do not prohibit capital punishment per se.

60. In a capital case, written findings with regard to mitigating circumstances are not mandated by either Kansas law or the United States Constitution.

61. No customary international law or international treaty prohibits the State of Kansas from invoking the death penalty as a punishment for certain crimes.

62. K.S.A. 21-4624(b) does not establish a specific time within which the State's motion for a separate sentencing proceeding must be made; rather, the motion requirement is intended to secure the orderly and systematic dispatch of the public business. The State's delay in filing a motion for a separate sentencing proceeding does not invalidate the resulting proceeding, absent prejudice to the defendant.

63. The sentencing proceeding under the Kansas capital-murder scheme has but one purpose: to determine whether the defendant should be sentenced to death. Only two options are contemplated: Either the jury will unanimously agree beyond a reasonable doubt that one or more aggravating circumstances exist and further that such aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, in which case it will sentence the defendant to death; or the jury will fail to so unanimously find, in which case the defendant will not be sentenced to death.

64. The Kansas death penalty scheme requires the jury to weigh the aggravating factors against the mitigating factors. The State should be permitted to introduce evidence



regarding the underlying circumstances of the prior crime to satisfy the aggravating circumstance contained in K.S.A. 21-4625(1), notwithstanding the defendant's offer to stipulate to the existence of the aggravating circumstance. However, courts must be careful to exercise their discretion in admitting such evidence in order to protect the rights of the defendant.

65. While evidence that a defendant has been well behaved in prison, and in the future will be similarly well behaved, is a mitigating circumstance, evidence of prison conditions does not bear on the defendant's character, prior record, or the circumstances of the offense. Therefore, it is not mitigating and, thus, generally not admissible at the penalty phase. However, such evidence may be admissible to rebut prosecutorial assertions regarding prison conditions.

66. The sentencing jury may not refuse to consider, as a matter of law, relevant mitigating evidence. However, this does not mean that the jury may not find some circumstances not to be mitigating but, rather, only precludes the jury from determining that it may not legally consider certain mitigating circumstances and evidence. The jury is free to determine for itself what circumstances it chooses to be mitigating and whether the evidence of those circumstances is sufficient.

67. In the absence of a request, the trial court has no duty to inform the jury in a capital murder case of the term of imprisonment to which a defendant would be sentenced if death were not imposed. Where such an instruction is requested, the trial court must provide the jury with the alternative number of years that a defendant would be required to serve in prison if not sentenced to death. Additionally, where a defendant has been found guilty of charges in addition to capital murder, the trial court upon request must provide the jury with the terms of imprisonment for each additional charge and advise the jury that the determination of whether such other sentences shall be

served consecutively or concurrently to each other and the sentence for the murder conviction is a matter committed to the sound discretion of the trial court.

68. The heinous, atrocious, or cruel manner aggravating circumstance in K.S.A. 21- 4625 is not targeted toward the motive for the killing but, rather, focuses on the manner in which the killing was committed. The heinous, atrocious, or cruel manner aggravating circumstance is not inconsistent with the avoiding arrest aggravating factor.

69. The standard of review and the ultimate question that must be answered with regard to whether prosecutorial misconduct in the penalty phase of a capital trial was harmless is whether the court is able to find beyond a reasonable doubt that the prosecutorial misconduct, viewed in the light of the record as a whole, had little, if any, likelihood of changing the jury's ultimate conclusion regarding the weight of the aggravating and mitigating circumstances. In this determination, the overwhelming nature of the evidence is a factor to be considered, although its impact is limited. The question for the reviewing court is not what effect the constitutional error might generally be expected to have upon a reasonable jury but, rather, what effect it had upon the actual verdict in the case at hand.

70. In order for an appellate court to determine that the evidence is so overwhelming as to make any prosecutorial misconduct harmless, the court must assume that all of the mitigating circumstances claimed by the defendant exist, and it must be able to say that, even so, the weight of the mitigators could not have outweighed that of the aggravating circumstances.

71. Even if instances of prosecutorial misconduct which occur during the penalty phase of a capital trial are harmless error in and of themselves, their cumulative effect must be analyzed. The issue is whether the sum total effect of the misconduct, viewed in light of the record as a whole, had little, if any likelihood of changing the jury's ultimate



conclusion regarding the weight of the aggravating and mitigating circumstances.

72. Counsel may not make assertions of fact in the form of questions to a witness absent a good faith basis for believing the asserted matters to be true.

73. While the State must be ready to establish the good faith basis for its questions, its responsibility to do so is triggered by an objection which asks it to do so, and where there is no such objection, the duty does not exist.

74. In the penalty phase of a capital proceeding, where a defendant presents evidence of a mitigating circumstance, the prosecution is permitted to cross-examine defense witnesses as to relevant facts and to introduce relevant evidence in order to rebut the existence of the mitigating circumstance.

75. When relevant evidence is admissible as to one party or for one purpose and is inadmissible as to other parties or for another purpose, the judge upon request shall restrict the evidence to its proper scope and instruct the jury accordingly. Although a trial judge is required to give such an instruction where applicable on request of one of the parties, the failure to do so when not requested is not error unless such failure is clearly erroneous.

76. A conviction based on perjured or false evidence is a violation of due process even in cases where the perjury or false evidence was not induced by the prosecution.

77. The Fifth Amendment to the United States Constitution, as well as § 10 of the Kansas Constitution Bill of Rights, protects the right of a defendant to exercise his or her privilege not to testify and forbids comment by the prosecution on the defendant's silence. A prosecutor commits error when the language used was manifestly intended or was of such a character that the jury would necessarily take it to be a comment on the failure of the accused to testify.

78. It is a violation of a defendant's Fifth Amendment rights for a prosecutor to comment on evidence of the defendant's courtroom behavior where the defendant has exercised his or her right not to testify.

79. Mitigating circumstances are those which in fairness may be considered as extenuating or reducing the degree of moral culpability, or blame, or which justify a sentence of less than death, even though they do not justify or excuse the offense. It is proper for a prosecutor to argue that certain circumstances not be considered as mitigating circumstances. However, it is improper for a prosecutor to argue that certain circumstances should not be considered as mitigating circumstances because they do not excuse or justify the crime.

80. A prosecutor should not express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

81. It is improper for a prosecutor to state facts in closing argument that are not in evidence or are contrary to the evidence.

82. It is proper for the prosecutor to argue that the defendant is not deserving of the jury's mercy because of the defendant's actions, as long as the prosecutor does not improperly state the law by arguing to the jury that it is prohibited from granting mercy to the defendant because the defendant showed none to the victim.

83. A prosecutor is allowed to introduce relevant evidence to show the victim's mental anguish and, further, to make arguments and inferences from the evidence that the victim suffered such mental anguish, where relevant. However, prosecutorial comments referring to what the victim was thinking are improper because they ask the jury to speculate on facts not in evidence. It is improper for a prosecutor to create an "imaginary script" in order to create and arouse the prejudice and passion of the sentencing jury.



84. During closing argument, a prosecutor may refer to and use photographs of victims admitted at trial as long as the purpose is not to unduly inflame the passions of the jury and prejudice it towards the defendant.

85. The future dangerousness of the defendant is not a statutory aggravating circumstance and it is improper for a prosecutor to make references to a defendant's potential for future dangerousness.

86. It is improper for a prosecutor to argue to the jury that it does not have the responsibility to determine the defendant's sentence.

87. It is proper for a prosecutor to argue that the defendant himself or herself should be held responsible for his or her actions.

88. It is not proper for a prosecutor to argue that a defendant should be punished for his or her prior crime. However, where the fact that the defendant was previously convicted of a felony in which the defendant inflicted death on another is an aggravating circumstance, it is proper for the prosecutor to argue about the relative weight of that aggravating circumstance as compared to the defendant's mitigating circumstances.

Jessica R. Kunen, chief appellate defender, and Steven R. Zinn, deputy appellate defender, argued the cause, and Rebecca E. Woodman, Reid T. Nelson, and Kirk C. Redmond, assistant appellate defenders, and David Gottlieb, of Kansas Defender Project, of Lawrence, were with them on the briefs for appellant.

Carla J. Stovall, attorney general, argued the cause, and David B. Debenham and Julene L. Miller, deputy attorneys general; Alexander M. Walczak, Athena E. Andaya, John K. Bork, and Jared S. Maag, assistant attorneys general; and Stephen R. McAllister, special assistant attorney general, were with them on the briefs for appellee.

Stephen P. Garvey, John H. Blume III, and Sheri Lynn Johnson, of Ithaca, New York, were on the brief for amicus curiae Cornell Death Penalty Project.

Andrea D. Lyon, of Ann Arbor, Michigan, was on the brief for amicus curiae National Association of Criminal Defense Lawyers.

Paige A. Nichols, of Lawrence, was on the brief for amicus curiae Kansas Association of Criminal Defense Lawyers.

Kent S. Scheidegger, of Sacramento, California, was on the brief for amicus curiae Criminal Justice Legal Foundation.

The opinion of the court was delivered by PER CURIAM.

* * * *

*Issue 23. Constitutionality of Weighing Equation*

Kleypas argues that the weighing equation set forth in K.S.A. 21-4624(e) violates the state and federal constitutional prohibitions against cruel and unusual punishment and the guarantees of due process because it mandates a sentence of death when aggravating and mitigating circumstances are found to be in equal balance. Under the facts of this case, we agree that the weighing equation violates the Eighth and Fourteenth Amendments to the United States Constitution.

K.S.A. 21-4624(e) provides:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

Kleypas argues that mandating death when aggravating and mitigating circumstances are found to be in equal balance produces unrealistic results, creates a presumption of death,



shifts the burden of proof to the defendant to prevent imposition of a death sentence, and precludes the jury from giving effect to the mitigating evidence.

The constitutionality of a statute is a question of law over which this court has de novo review. *State v. Ponce*, 258 Kan. 708, 709, 907 P.2d 876 (1995). We must decide if the weighing equation in the statute violates the Eighth Amendment to the United States Constitution because it mandates a sentence of death if the jury finds that the mitigating and aggravating circumstances are in equipoise. Equipoise is a result of mandating the death sentence if the mitigating circumstances do not outweigh the aggravating circumstances.

Kleypas contends that the Kansas weighing formula is unique among the 38 death penalty states by mandating a death sentence when there is equipoise. Although no other state statute has identical language to our statute, five states have similar language resulting in the same weighing equation.

Kleypas first raised the equipoise issue by motion filed in the district court. The district court denied the motion, finding that the United States Supreme Court approved such a statutory scheme in *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). The district court's reliance on *Proffitt* is misplaced. In *Proffitt*, the Supreme Court noted:

> "The jury found the defendant guilty as charged. Subsequently, as provided by Florida law, a separate hearing was held to determine whether the petitioner should be sentenced to death or to life imprisonment. Under the state law that decision turned on whether certain statutory aggravating circumstances surrounding the crime outweighed any statutory mitigating circumstances found to exist." 428 U.S. at 245-46, 96 S.Ct. 2960.

Justice White in concurring also noted: "Under Florida law, the sentencing judge is *required* to impose the death penalty on all first-degree murderers as to whom the statutory aggravating factors outweigh the mitigating factors." 428 U.S. at 260, 96 S.Ct. 2960 (White, J., concurring). The Florida weighing equation is not the same as ours. Under the Florida weighing equation, a death sentence cannot be imposed if there is a finding that equipoise exists. *Proffitt* does not support the district court's decision in the present case. In addition, the Florida jury returns an advisory verdict, and the judge has the ultimate responsibility for sentencing the defendant.

Kleypas cites three cases in support of his constitutional challenge to K.S.A. 21-4624(e). The first is *State v. Biegenwald,* 106 N.J. 13, 524 A.2d 130 (1987). The New Jersey statute in effect at the time of the crime stated in part: " 'If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death.' " 106 N.J. at 58, 524 A.2d 130. The court considered the weighing equation *sua sponte,* finding it constituted plain error. The court stated:

> "The error concerns the jury's function in balancing aggravating factors against mitigating factors, a function that leads directly to its ultimate life or death decision. Its effect was to allow a death sentence without a finding that the aggravating factors outweighed the mitigating factors beyond a reasonable doubt. We hold that such a finding was required by the Act at the time of defendant's trial as a matter of fundamental fairness and that its absence mandates reversal and retrial of the penalty decision. Legislative policy also mandates this result, as indicated by the 1985 amendments to the Act; those amendments, furthermore, provide an independent basis for this result." 106 N.J. at 53, 524 A.2d 130.



The court made it clear that the former rather than the latter was ultimately the basis for its decision: "If anywhere in the criminal law a defendant is entitled to the benefit of the doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." 106 N.J. at 62, 524 A.2d 130.

In *People v. Young,* 814 P.2d 834 (Colo.1991), the Colorado Supreme Court considered the constitutionality of their statutory weighing equation which required the jury return a sentence of death if the jury found insufficient mitigating factors to outweigh the statutory aggravating factors. The court noted that under this formula a death sentence was mandated if the "mitigators and aggravators are equally balanced." 814 P.2d at 839. The court concluded that the statute violated the state constitution provision against cruel and unusual punishment, stating:

> "The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury *cannot* determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and reliable conclusion that the death sentence should be imposed. That such a result is mandated by statute rather than arrived at by a jury adds nothing to the reliability of the death sentence. The legislature has committed the function of weighing aggravators and mitigators to the jury. A jury determination that such factors are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded

inconclusive results. A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. Accordingly, we conclude that the statute contravenes the prohibition of cruel and unusual punishments under article II, section 20, of the Colorado Constitution, and deprives the defendant of due process of law under article II, section 25, of that constitution." 814 P.2d at 845.

Although the decision in *Young* rests upon state constitutional grounds, the court found that the United States Supreme Court had not addressed the equipoise issue, stating:

"Key to the United States Supreme Court rulings is the conclusion that a limitation on the class of persons eligible for the death penalty is constitutionally required and may be accomplished by a finding of at least one aggravating factor, and that a weighing of all relevant mitigating factors is constitutionally required before a sentence of death can be imposed on a particular individual. *Walton [v. Arizona,* 497 U.S. 639*]* 110 S.Ct. [3047] at 3056 [111 L.Ed.2d 511 (1990)] (plurality opinion); *Boyde [v. California,* 494 U.S. 370*]* 110 S.Ct. [1190] at 1196 [108 L.Ed.2d 316 (1990)]; *Blystone [v. Pennsylvania,* 494 U.S. 299*]* 110 S.Ct. [1078] at 1083 [108 L.Ed.2d 255 (1990)]. The basis for these requirements 'is the principle that punishment should be directly related to the personal culpability of the criminal defendant.' *Penry,* 492 U.S. at 319, 109 S.Ct. at 2947. Thus, the Court in *Penry* stated

" ' "that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Only then can we be sure that the sentencer has treated the defendant as a 'uniquely individual human bein[g]' and has made a reliable determination that death is the appropriate



sentence." ' " *Penry,* 492 U.S. at 319, 109 S.Ct. at 2947 (quoting *Woodson,* 428 U.S. at 304, 96 S.Ct. at 2991) (citation omitted).

Constitutional sufficiency is not assured simply because the jury is not limited in the mitigating factors it may hear and consider. The sentencer must also determine whether those mitigating factors are outweighed by the aggravating factors, *Boyde,* 110 S.Ct. at 1196; *Blystone,* 110 S.Ct. at 1083, or, stated alternatively, are sufficient to call for leniency, *Walton,* 110 S.Ct. at 3056. We find nothing in the reasoning in the United States Supreme Court cases cited that casts doubt on our conclusion that the Colorado death penalty statute fails to satisfy our own constitutional standards. We do not believe that the United States Supreme Court cases can be fairly read to contain any suggestion that the death penalty can be imposed when the sentencer finds aggravating and mitigating considerations to be equally balanced. Even if we are wrong in our understanding of federal precedent, however, we hold that to authorize imposition of the death penalty when aggravators and mitigators weigh equally, as does the current version of section 16-11-103, violates fundamental requirements of certainty and reliability under the cruel and unusual punishments and due process clauses of the Colorado Constitution." 814 P.2d at 846.

The third case relied on by Kleypas is *Hulsey v. Sargent,* 868 F.Supp. 1090 (E.D.Ark.1993). At issue in *Hulsey* was the Arkansas statute mandating a death sentence if the mitigating circumstances did not outweigh the aggravating circumstances. 868 F.Supp. at 1092. The court noted the problem such an equation created:

"If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be *obliged* to impose the death sentence since the mitigating

> circumstances would not be found to outweigh the aggravating. The requirement that the aggravating circumstances justify the sentence of death, which could easily be (and was probably intended to be) construed as an independent inquiry (satisfied by a single finding of an aggravating circumstance) would not cure the presumption created by the equation." 868 F.Supp. at 1101.

The court concluded: "Here, it is explicit in the statute that mitigating must outweigh aggravating circumstances and no saving instruction is found. Here too, the strictures of the Eighth and Fourteenth Amendments with their requirements of individualized sentencing and full consideration of evidence in mitigation appear to require relief." 868 F.Supp. at 1103.

The State does not bother to respond or attempt to distinguish the cases cited by Kleypas. Instead, the State relies completely on *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990). In *Walton,* the United States Supreme Court considered the constitutionality of the Arizona statute which provided that the court " 'shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated ... and that there are no mitigating circumstances sufficiently substantial to call for leniency.' " 497 U.S. at 644, 110 S.Ct. 3047.

The State argues that the U.S. Supreme Court specifically addressed this issue in *Walton* and rejected Kleypas' argument. The State's argument is premised on its view that the Arizona statute "is functionally indistinguishable from the Kansas statute in this respect." We disagree and find the two statutes distinguishable. The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before this court. Such a weighing equation results in mandating a death sentence



where the jury finds equipoise as to the mitigating and aggravating circumstances.

As previously noted, the Colorado Supreme Court in *Young* distinguished the language in the Arizona statute from the Colorado statute and found that the issue of equipoise was not raised or decided in *Walton.* 814 P.2d at 846. We agree.

The failure of the plurality in *Walton* to address equipoise was noted by Justice Blackmun in his dissent:

> "The plurality does not attempt to explain why Arizona may require a capital sentence in a case where aggravating and mitigating circumstances are evenly balanced. Indeed, the plurality does not even acknowledge that this is the dispositive question. Instead, it offers only a conclusory assertion: 'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency. [Citation omitted.]' " 497 U.S. at 688, 110 S.Ct. 3047 (Blackmun, J., dissenting).

Justice Blackmun, however, addressed the issue:

> "If the mitigating and aggravating circumstances are in equipoise, the statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.' *Woodson v. North Carolina,* 428 U.S., at 305 [96 S.Ct. 2978] (plurality opinion).
>
> "The plurality takes a hard-line approach and makes little effort to ground its holding on our Eighth Amendment jurisprudence. In support of its position, the plurality

cites only two very recent capital cases, *Blystone v. Pennsylvania,* 494 U.S., at 305 [110 S.Ct. 1078] (1990) and *Boyde v. California,* 494 U.S. 370 [110 S.Ct. 1190, 108 L.Ed.2d 316] (1990). Reliance even on these precedents is misplaced. The statutes upheld in those cases provided that the death penalty would be imposed 'only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances.' *Blystone,* 494 U.S., at 305 [110 S.Ct. 1078]. In neither *Boyde* nor *Blystone* did the challenged statute require a capital sentence when aggravating and mitigating factors are evenly balanced. Those decisions simply do not speak to the issue posed by the Arizona statute: whether the State permissibly may place upon the capital defendant the burden of demonstrating that a sentence of death is not appropriate." 497 U.S. at 687-88, 110 S.Ct. 3047 (Blackmun, J., dissenting).

In *Montana v. Smith,* 261 Mont. 419, 863 P.2d 1000 (1993), the Montana Supreme Court considered the Montana statute which read:

> "In determining whether to impose a sentence of death or imprisonment, the court shall take into account aggravating and mitigating circumstances ... and shall impose a sentence of death if it finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency." Mont.Code Ann. § 46-18-305 (1977).

The Montana Supreme Court rejected the *Young* rationale on the basis that the Montana weighing equation was much different from that of Colorado. The court held Montana's statute "requires imposition of the death penalty if the court finds one or more aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency. Unlike the Colorado provision, it does not require



the death sentence to be imposed if the aggravating and mitigating factors are of equal weight." 261 Mont. at 438, 863 P.2d 1000.

The difference between the language in K.S.A. 21-4624(e) and the Arizona statute is expressed in the *amicus curiae* Cornell Death Penalty Project brief as follows:

> "On its face, the Arizona provision operates on a different logic than does section 21-4624(e). Unlike section 21-4624(e), the Arizona statute does *not* tell the sentencer to impose death if aggravating circumstances are not outweighed by mitigating circumstances. Instead, it requires death only if 'there are not mitigating circumstances sufficiently substantial to call for leniency.' The key to the Arizona sentencing formula is the idea of 'sufficiently substantial.'
>
> "That language, unlike section 21-4624(e), does not direct the sentencer to impose death if it finds aggravating and mitigating circumstances are in equipoise. If a sentencer in Arizona thought aggravating and mitigating circumstances were equally balanced, he or she could reasonably conclude that there were mitigating circumstances 'sufficiently substantial to call for leniency,' *or* he or she could reach the opposite conclusion. The law leaves the sentencer free to decide either way. In contrast, a Kansas juror who reached the same conclusion about the relative balance between aggravation and mitigation would have only one option: to impose death. In fact, under the Arizona scheme a sentencer who thought that aggravating circumstances actually *outweighed* mitigating circumstances could *still* conclude that the available mitigating circumstances were 'sufficiently substantial' – i.e., that they crossed some critical threshold of substantiality – to 'call for leniency.' A Kansas juror clearly does not have that option."

This court has addressed this issue in the context of K.S.A.1999 Supp. 21- 4635(c), the hard 40 sentence. *In*

*State v. Spain,* 269 Kan. 54, 60, 4 P.3d 621 (2000), we held that statute was not unconstitutional. We made it clear that the death penalty cases are not controlling in hard 40 cases. Likewise, hard 40 cases are not controlling when the sentence is death. That distinction is reflected by the State not citing or relying on our decision in *Spain. Spain* is not controlling here because the death penalty is different from all other punishments:

> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina,* 428 U.S. 280, 305, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Justice Stevens wrote:

> "In the 12 years since *Furman v. Georgia,* 408 U.S. 238 [92 S.Ct. 2726, 33 L.Ed.2d 346] (1972), every Member of this Court has written or joined at least one opinion endorsing the proposition that because of its severity and irrevocability, the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards to ensure that it is a justified response to a given offense." *Spaziano v. Florida,* 468 U.S. 447, 468, 104 S.Ct. 3154, 82 L.Ed.2d 340 (Stevens, J., concurring in part and dissenting in part).

In *Spain,* we said:

> "In addition, we reaffirm that death penalty cases are not controlling in hard 40 cases. The distinction between the two is obvious. The death penalty as it existed prior to the decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), was held to be unconstitutional. The unconstrained discretion in imposing the death penalty constituted cruel and unusual



> punishment in violation of the Eighth and Fourteenth Amendments. The states were required to provide ' "specific and detailed guidance" ' and ' "make rationally reviewable the process for imposing a sentence of death." ' *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (quoting *Proffitt v. Florida,* 428 U.S. 242, 253, 96 S.Ct. 2960, 49 L.Ed.2d 913 [1976], and *Woodson v. North Carolina,* 428 U.S. 280, 303, 96 S.Ct. 2978, 49 L.Ed.2d 944 [1976], respectively). Not so with a hard 40 sentence. In *State v. Bailey,* 251 Kan. 156, 171, 834 P.2d 342 (1992), we said: '[T]he finality and severity of the imposition of the death penalty, the hurdles the prosecution must clear if the death penalty is to be imposed are higher than in any other area of criminal law.' The United States Supreme Court, in *Rummel v. Estelle,* 445 U.S. 263, 272, 100 S.Ct. 1133, 63 L.Ed.2d 382 (1980), stated: 'Because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishments to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.' " 269 Kan. at 59-60, 4 P.3d 621.

No issue is more difficult or divisive than determining to what extent a capital punishment is permitted under the Eighth and Fourteenth Amendments to the United States Constitution. We determined earlier in this opinion that the death penalty in and of itself does not constitute cruel and unusual punishment under the Eighth Amendment. The issue we grapple with here is whether the imposition of the death penalty under our statutory weighing formula constitutes cruel and unusual punishment under the Eighth Amendment. More specifically, is K.S.A. 21-4624(e) applied in an unconstitutional manner by mandating death if the aggravating and mitigating circumstances are in equipoise?

In *Furman v. Georgia,* 408 U.S. 238, 309-10, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the Supreme Court held the death

penalty as imposed in Georgia to be cruel and unusual punishment in violation of the Eighth and 14th Amendments. The Supreme Court did so in a one paragraph, *per curiam* opinion. The rationale of the decision is to be found in the five separate opinions which follow the *per curiam* opinion. That poses some difficulty since none of the five separate opinions concurred in any of the other opinions. Four justices filed separate dissents.

The opinions of Justices White and Stewart are relied on in subsequent opinions of the Supreme Court. Both made it clear that the death penalty is not in itself cruel and unusual under the Eighth Amendment. Justice Stewart's view was that the "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." 408 U.S. at 310, 92 S.Ct. 2726 (Stewart, J., concurring). Justice White wrote: "[T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." 408 U.S. at 313, 92 S.Ct. 2726 (White, J., concurring).

Four years later, the Supreme Court approved the Georgia death penalty statute as amended in response to the Court's decision in *Furman.* In *Gregg v. Georgia,* 428 U.S. 153, 207, 96 S.Ct. 2909, 49 L.Ed.2d 859, *reh. denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158, (1976), the Court found the amended death penalty statutes to be constitutional. That decision was announced by three justices: Stewart, Powell, and Stevens. The three justices focused on the procedure by which the defendant was given the death penalty and not the actual punishment. Justices White and Rehnquist and Chief Justice Burger concurred in the judgment by separate opinion, as did Justice Blackmun. The Georgia statute required that the jury must find beyond a reasonable doubt 1 of 10 statutory aggravating circumstances before it can impose a sentence of death.



> "In addition, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. [Citation omitted.] The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, [citation omitted], but it must find a statutory aggravating circumstance before recommending a sentence of death." 428 U.S. at 197, 96 S.Ct. 2909.

Stewart went on to write:

> "No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (e.g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, 'the discretion to be exercised is controlled by clear and objective standards so as to produce nondiscriminatory application.' *Coley v. State,* 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974.)" 428 U.S. at 197-98, 96 S.Ct. 2909.

Following the Georgia decision, the Supreme Court invalidated the mandatory death penalty statutes passed in some states in response to *Furman. Woodson v. North Carolina,* 428 U.S. at 303, 96 S.Ct. 2978. The Supreme Court concluded that the death sentence process must

include consideration of the "character and record of the individual offender." 428 U.S. at 304, 96 S.Ct. 2978. In *Penry v. Lynaugh,* 492 U.S. 302, 316, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the Court noted:

> "Indeed, as *Woodson v. North Carolina,* 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] (1976), made clear, 'in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.' Id., at 304 [96 S.Ct. 2978] (plurality opinion)."

The Court further stated:

> "Our decisions subsequent to *Jurek [v. Texas,* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976)*]* have reaffirmed that the Eighth Amendment mandates an individualized assessment of the appropriateness of the death penalty. In *Lockett v. Ohio,* 438 U.S. 586 [98 S.Ct. 2954, 57 L.Ed.2d 973] (1978), a plurality of this Court held that the Eighth and Fourteenth Amendments require that the sentencer 'not be precluded from considering, *as a mitigating factor,* any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' " 492 U.S. at 317, 109 S.Ct. 2934.
>
> "Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, 'evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have



> no such excuse.' *California v. Brown,* 479 U.S. 538, 545 [107 S.Ct. 837, 93 L.Ed.2d 934] (1987) (O'Connor, J., concurring). Moreover, *Eddings* makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence." 492 U.S. at 319, 109 S.Ct. 2934.

Justice O'Connor, concurring in *Franklin v. Lynaugh,* 487 U.S. 164, 184-85, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), wrote:

> "[I]t is clear that a State may not constitutionally prevent the sentencing body from giving effect to evidence relevant to the defendant's background or character or the circumstances of the offense that mitigates against the death penalty. Indeed, the right to have the sentencer consider and weigh relevant mitigating evidence would be meaningless unless the sentencer was also permitted to give effect to its consideration."

In *Penry,* Justice O'Connor speaking for a majority of the Court wrote:

> "But as we made clear in *Gregg,* so long as the class of murderers subject to capital punishment is narrowed, there is no constitutional infirmity in a procedure that allows a jury to recommend mercy based on the mitigating evidence introduced by a defendant. Id., at 197-199, 203, 108 S.Ct. 2320.
>
> ....
>
> " 'In contrast to the carefully defined standards that must narrow a sentencer's discretion to *impose* the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to *decline to impose* the death sentence.' *McCleskey v. Kemp,* 481 U.S. 279, 304 [107 S.Ct. 1756, 95 L.Ed.2d 262] (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the

jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the jury is to give a ' " 'reasoned moral response to the defendant's background, character, and crime.' " ' *Franklin,* 487 U.S., at 184 [108 S.Ct. 2320] (O'Connor, J., concurring in judgment) (quoting *California v. Brown,* 479 U.S., at 545 [107 S.Ct. 837] [O'Connor, J., concurring] ). In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,' *Woodson,* 428 U.S., at 305 [96 S.Ct. 2978], the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.'' 492 U.S. at 327, 109 S.Ct. 2934.

Penry argued that the jury was unable to express its "reasoned moral response" to his mitigation evidence of his mental retardation and childhood abuse in determining if death was an appropriate sentence. The Court agreed, stating:

> "In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision. Our reasoning in *Lockett* and *Eddings* thus compels a remand for resentencing so that we do not 'risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.' *Lockett,* 438 U.S., at 605 [98 S.Ct. 2954]; *Eddings,* 455 U.S., at 119 [102 S.Ct. 869] (O'Connor, J., concurring). 'When the choice is between life and death, that risk is unacceptable and incompatible



> with the commands of the Eighth and Fourteenth Amendments.' *Lockett,* 438 U.S., at 605 [98 S.Ct. 2954]." 492 U.S. at 328, 109 S.Ct. 2934.

In *Woodson,* Justice Stewart speaking for the majority wrote:

> "While the prevailing practice of individualizing sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment, see *Trop v. Dulles,* 356 U.S., at 100 [78 S.Ct. 590] (plurality opinion), requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.
>
> "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." 428 U.S. at 304-05, 96 S.Ct. 2978 (Brennan, J., concurring).

If we are to give more than lip service to the principles espoused by the Supreme Court, then the weighing equation in K.S.A. 21-4624 cannot be approved. The Eighth Amendment forbids unguided discretion in imposing a sentence of death. Under our statutes, the jury discretion is guided by requiring that it find the existence of one statutory aggravated circumstance. That narrows the class of those eligible for the death penalty. The Supreme Court has made it clear that the process cannot stop there. Of equal importance is the sentencer's consideration of the mitigating circumstances. Here, the jury as the fact finder must be given discretion in considering and giving effect to the mitigating circumstances. As previously noted, the Georgia capital

sentencing statutes, approved in *Gregg,* did not limit the jury's consideration of the mitigating circumstances. Here, the weighing equation not only limits the jury's consideration, it mandates death if the aggravating and mitigating circumstances are equal. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstance that it finds exist.

It is important to note that on March 14, 1995, the attorney general analyzed the statute and recommended in the House Judiciary Committee of the Kansas Legislature that the statute be amended to require that aggravating circumstances outweigh mitigating circumstances, stating: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense...." Unfortunately, the legislature did not follow the attorney general's recommendation.

As the New Jersey Supreme Court pointed out in *Biegenwald,* there is a similarity of the jury's function in weighing the aggravating and mitigating circumstances to that of determining guilt or innocence of the defendant. The burden is the same. The process is much the same and the outcome as serious, if not more so. The penalty of death is not only unique in its severity, but it is irrevocable. The United States Supreme Court noted the similarity in *Spaziano v. Florida,* 468 U.S. at 458-59, 104 S.Ct. 3154:

> "This Court, of course, has recognized that a capital proceeding in many respects resembles a trial on the issue of guilt or innocence. See *Bullington v. Missouri,* 451 U.S. 430, 444 [101 S.Ct. 1852, 68 L.Ed.2d 270] (1981). Because the ' "embarrassment, expense and ordeal" ... faced by a defendant at the penalty phase of a ... capital murder trial ... are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial,' the Court has concluded that the Double Jeopardy Clause bars the State from making repeated efforts to persuade a sentencer to impose the death penalty. Id., at 445 [101 S.Ct. 1852], quoting *Green v. United States,* 355 U.S. 184, 187 [78 S.Ct. 221, 2 L.Ed.2d 199] (1957); *Arizona v. Rumsey,* 467 U.S. 203 [104 S.Ct. 2305, 81 L.Ed.2d 164] (1984)."



The legislature cannot mandate a death sentence for any category of murder. The legislature is limited to defining who is eligible, within constitutional limits, to receive the death penalty. It is for the jury, within permissible guidelines, to determine who will live and who will die. The issue is not whether the penalty of death is per se cruel and unusual punishment. *Furman* did not hold that the death penalty was cruel and unusual punishment per se under the Eighth Amendment. Here the issue, as that before the *Furman* court, is whether the process used to select which defendant will receive the irrevocable penalty of death "comports with the basic concept of human dignity at the core of the [Eighth] Amendment." *Gregg,* 428 U.S. at 183, 96 S.Ct. 2909.

Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its "reasoned moral response" to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a "tie goes to the defendant" when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional.

Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death

penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise.

In *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976), the defendant challenged the constitutionality of the definition of obscene material contained in K.S.A. 21-4301(2)(a) and (3) (Weeks). In 1973, the United States Supreme Court in *Miller v. California,* 413 U.S. 15, 24, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), revised the test for obscenity. The definition of obscene material in K.S.A. 21-4301 (Weeks) did not conform to the constitutional requirements of *Miller.* The district court, however, found the films to be obscene by construing the broader definition in our statute to conform to the requirement of the *Miller* decision. Simply stated, the district court read the *Miller* standards into K.S.A. 21- 4301. This court affirmed the district court on appeal, stating:

> "This court has on previous occasions seen fit to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad.
>
> ....
>
> "Construction of this sort, moreover, was invited by the United States Supreme Court in *Miller* in which the Chief Justice speaking for a majority said:
>
> 'We do not hold ... that all States ... must now enact new obscenity statutes. Other existing state statutes as construed heretofore or hereafter, may well be adequate. [Citation omitted]' (413 U.S. at 24, note 6, 93 S.Ct. at 2615, 37 L.Ed.2d at 430.)
>
> "The high court has itself adopted this course of judicial construction of statutes as noted in *United States v. 12-200-Ft. Reels of Film,* 413 U.S. 123, 93 S.Ct. 2665, 37 L.Ed.2d 500, and in *United States v. Thirty-Seven Photographs,* 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822, reh. den. 403 U.S. 924, 91 S.Ct. 2221, 29 L.Ed.2d 702, with respect to federal statutes.



> "In at least nine other states the courts have held that their obscenity statutes, though not couched in the language of *Miller,* should be judicially construed in a manner consistent with *Miller* and thereby evade constitutional challenge in the future. [Citations omitted.]
>
> "We realize that to construe the statute to meet constitutional standards we may be subject to the accusation that we are invading the province of the legislature. However, after considering the manifest intention of the legislature when it passed K.S.A. 21-4310, *et seq.,* and our past difficulties in this area of regulating obscenity we feel fully justified in construing and limiting the present statute to meet constitutional standards. Such was the original intent of the Kansas legislature." 219 Kan. at 70-71, 547 P.2d 760.

This court then "authoritatively" construed K.S.A. 21-4301 (Weeks) to include the *Miller* test and held a conviction may be had under the statute.

In *In re Adoption of Baby Boy L.,* 231 Kan. 199, 223, 643 P.2d 168 (1982), Justice Holmes, speaking for the court, said:

> "In examining the constitutionality of any statute there are certain basic principles which must be adhered to:
>
> " 'We start with the proposition that the constitutionality of a statute is presumed; that all doubts must be resolved in favor of its validity, and before the statute may be stricken, it must clearly appear the statute violates the Constitution. It is the court's duty to uphold the statute under attack, if possible, rather than defeat it. If there is any reasonable way a statute may be construed constitutionally permissible, that should be done.' *Board of Greenwood County Comm'rs v. Nadel,* 228 Kan. 469, Syl. ¶ 1, 618 P.2d 778 (1980).
>
> " 'A statute, apparently valid upon its face, may be unconstitutional in its application to a particular set of facts, circumstances or classifications.' *Flax v. Kansas*

*Turnpike Authority,* 226 Kan. 1, Syl. ¶ 6, 596 P.2d 446 (1979).

"The corollary of *Flax,* of course, is that a statute apparently void on its face may be constitutional when limited and construed in such a way as to uphold its constitutionality by reading the necessary judicial requirements into the statute. This has often been done when it is clear that such an interpretation will carry out the intent of the legislature. *State v. Motion Picture Entitled "The Bet "*, 219 Kan. 64, 70, 547 P.2d 760 (1976); *State v. Gunzelman,* 210 Kan. 481, 502 P.2d 705 (1972); *State v. Hart,* 200 Kan. 153, 434 P.2d 999 (1967)."

In *State v. Durrant,* 244 Kan. 522, 769 P.2d 1174 (1989), the district court ruled K.S.A. 79-5201 *et seq.* (Ensley) unconstitutional in violation of the Fifth Amendment to the United States Constitution. The district court held K.S.A. 79-5206 (Ensley) did not grant absolute immunity and thus did not prohibit the use of the information in prosecuting for other crimes. In other words, as written, K.S.A. 79-5206 granted use immunity but not derivative-use immunity. This court, relying on *In re Adoption of Baby Boy L.* and *State v. Motion Picture Entitled "The Bet,"* reversed the district court:

"This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if the same can be done within the apparent intent of the legislature in passing the statute. To accomplish this purpose the court may read the necessary judicial requirements into the statute. *In re Adoption of Baby Boy L.,* 231 Kan. 199, Syl. ¶ 13, 643 P.2d 168 (1982); *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64, 547 P.2d 760 (1976); *State v. Gunzelman,* 210 Kan. 481, 502 P.2d 705 (1972); *State v. Hart,* 200 Kan. 153, 434 P.2d 999 (1967). We think it is obvious, and we so hold, that the legislature, by its enactment of 79-5206 as a part of the



act, intended to extend not only use immunity but also derivative-use immunity to any person complying with the act. As construed, the immunity granted by the act is at least coextensive with the privilege against self-incrimination provided by the Fifth Amendment of the United States Constitution, and the act as so construed is constitutional." 244 Kan. at 534-35, 769 P.2d 1174.

The legislative intent in passing the death penalty act is obvious. K.S.A. 21-4624 provides for a death sentencing scheme by which a sentence of death is imposed for certain offenses. By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment. Our holding requires that this case be remanded for the jury to reconsider imposition of the death penalty.

We set aside the death sentence for the reasons set out above and remand for resentencing in accordance with K.S.A. 21-4624 as construed herein.

Because we hold that the provisions of K.S.A. 21-4624 are constitutional as interpreted by this court, it becomes necessary to address Kleypas' additional constitutional challenges regarding capital murder provisions of Kansas statutory law.

* * * *

DAVIS, J., dissenting:

I join the majority opinion in all respects except on the issue of equipoise. I respectfully dissent from the majority's conclusion that the weighing equation within the Kansas

death penalty statute, K.S.A. 21-4624(e), violates the Eighth Amendment to the United States Constitution because it mandates death where mitigating circumstances and aggravating circumstances are found to be equal (equipoise). The express provisions of K.S.A. 21-4624(e) mandate the imposition of a death sentence where "the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Yet, the majority changes the express language of the legislature to say that death may be mandated only where *aggravating circumstances outweigh any mitigating circumstance found to exist.*

The majority reverses the weighing equation adopted by the legislature in K.S.A. 21-4624(e) with the idea that the intent of the legislature is to be carried out in a constitutional manner. There is no question, based on the express language of the legislature, that it intended to mandate the imposition of a death sentence where the existence of such aggravating circumstances is not outweighed by any mitigating circumstances found to exist. The precise question was brought to the attention of the legislature in testimony by the attorney general, who recommended that the statute provide for the aggravating circumstances to outweigh the mitigating circumstances before a death sentence may be imposed. The legislature rejected that suggestion of the attorney general and adopted our present statute.

The majority, however, replaces the express language with its own language based upon its conclusion that this new language carries out the intent of the legislature in a constitutional manner. Because the new language mandated by the majority is contrary to the expressed intent and language adopted by the legislature in K.S.A. 21-4624(e), I believe the majority *invades the province of the legislature.* In the face of a clearly expressed legislative intent, the majority not only strikes this clear language as unconstitutional but adopts language exactly the opposite of what the legislature stated. If the language of the statute



offends the Constitution, the appropriate judicial solution, in my opinion, is to so hold and let the legislature resolve the matter consistent with the court's opinion.

More importantly, however, I respectfully dissent from the majority's conclusion that the weighing equation contained in K.S.A. 21-4624(e) is unconstitutional. Thus, I would conclude that there is no need to change the weighing equation in that it is constitutional under the Eighth Amendment as expressed by the Kansas Legislature in accordance with *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990).

The majority holds that the weighing equation contained in K.S.A. 21- 4624(e) violates the United States and Kansas Constitutions because it mandates a sentence of death when the aggravating and mitigating circumstances are found to be in equipoise. K.S.A. 21-4624(e) states:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law."

The statute provides that the defendant "shall" be sentenced to death where the jury finds that the mitigating circumstances do not outweigh the aggravating circumstances. Theoretically, if the jury were to somehow determine that the aggravating and mitigating circumstances were equally balanced, the defendant would be sentenced to death, as the mitigators would not outweigh the aggravators. The question is whether a weighing equation which has the potential to produce this result is unconstitutional. It is a question of law over which appellate review is unlimited.

As noted in the majority decision, this court has previously rejected the argument that this same weighing equation was

unconstitutional in the context of a hard 40 sentencing decision in *State v. Spain*, 269 Kan. 54, 4 P.3d 621 (2000). However, the majority correctly points out that our decision in Spain was premised in part on the concept that noncapital cases are of limited precedential value in analyzing capital cases due to the greater scrutiny to which capital cases must be held. See *Spain*, 269 Kan. at 59- 60, 4 P.3d 621. Thus, the result in Spain is not controlling, and the question must instead be analyzed through the specialized lens of the strictures of the United States Constitution with regard to a sentence of death.

The United States Supreme Court has imposed a number of requirements on the capital sentencing process. States must limit and channel the discretion of judges and juries in order to minimize the risk of wholly arbitrary and capricious action. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, *reh. denied* 429 U.S. 875, 97 S.Ct. 197, 50 L.Ed.2d 158 (1976). At the same time, the sentencer must be allowed to retain sufficient discretion to consider the particular circumstances of the crime and the characteristics of the defendant. See *Gregg*, 428 U.S. at 196-98, 96 S.Ct. 2909; *Woodson v. North Carolina*, 428 U.S. 280, 304, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). One way in which this may be accomplished is through a process which requires the sentencer to weigh certain aggravating and mitigating circumstances in order to determine whether a defendant should be sentenced to death. *Proffitt v. Florida*, 428 U.S. 242, 259-60, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (holding that a scheme which required the sentencer to determine whether mitigating circumstances were sufficient to outweigh aggravating circumstances adequately guided and channeled the sentencer's discretion).

While the Court has imposed numerous requirements on the guiding and channeling of the sentencer's discretion, the actual weighing of aggravating and mitigating circumstances has been left up to the states. In *Zant v. Stephens*, 462 U.S. 862, 890, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Court



stated that "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." Similarly, in *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), the Court stated: "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required."

The Court continued this theme in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). In Blystone, the question was whether a weighing equation which made the death penalty mandatory where aggravating circumstances outweighed mitigating circumstances was constitutional. The Court ruled that it was, stating: "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." 494 U.S. at 307, 110 S.Ct. 1078. The Court noted: "Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." 494 U.S. at 309, 110 S.Ct. 1078.

In *Boyde*, the question was the same as that in *Blystone*: whether that State's death penalty scheme, which required death when aggravating circumstances outweighed mitigating circumstances and required life when mitigating circumstances outweighed aggravating circumstances, was constitutional. The defendant argued that the jury must have freedom to reject the death penalty even if it found that aggravating circumstances outweighed mitigating circumstances. The Court, however, stated: "[T]here is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " 494 U.S. at 377, 110 S.Ct. 1190.

In both *Blystone* and *Boyde*, the Court faced a statute which mandated death when the aggravators outweighed the mitigators. This changed, however, with a third death penalty case decided in 1990, *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511. *Walton* involved the constitutionality of the Arizona death penalty scheme. I believe *Walton* is ultimately determinative of the question in this case. In order to place the Court's decision in *Walton* in context, it is necessary to detail the events which led up to the decision.

The Arizona statute at issue in *Walton* provided that the sentencing judge "shall" impose the death penalty if one or more aggravating circumstances is found and the "mitigating circumstances are held insufficient to call for leniency." The majority places great emphasis upon the difference between the language of the Arizona statute and the Kansas statute. K.S.A. 21-4624(e) provides that death is mandated where aggravating circumstances are not outweighed by mitigating circumstances. What the majority fails to note is that the Arizona Supreme Court interpreted (and still interprets) the weighing equation to mean the same as that stated by the Kansas statute: The death penalty shall be imposed where the aggravating circumstances are not outweighed by the mitigating circumstances. See *State v. Ysea*, 191 Ariz. 372, 375, 956 P.2d 499 (1998) ("If the judge finds one or more of the aggravating factors listed in § 13-703[F], the defendant is death eligible, and if the aggravating factors are not outweighed by mitigating factors listed in § 13-703[G], the resulting sentence is death."); *State v. Gretzler*, 135 Ariz. 42, 53-55, 659 P.2d 1 (1983); see also *Walton*, 497 U.S. at 687, 110 S.Ct. 3047 (Blackmun, J., dissenting) ("The Arizona Supreme Court repeatedly has indicated that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation.").

The issues in *Walton* developed as the result of a controversy over whether this formulation of the weighing equation



violated the United States Constitution. In *State v. Walton*, 159 Ariz. 571, 584, 769 P.2d 1017 (1989), the defendant challenged the Arizona statutory scheme as unconstitutional, arguing, *inter alia*, that "it impermissibly places the burden of proof of mitigation on the defendant" and "it does not require proof beyond a reasonable doubt that the aggravating factors outweigh the mitigating ones." The Arizona Supreme Court summarily rejected these arguments. 159 Ariz. at 584-85, 769 P.2d 1017. However, less than 2 months earlier, the Ninth Circuit Court of Appeals had been more receptive to an attack on the Arizona statutory scheme. See *Adamson v. Ricketts*, 865 F.2d 1011, 1043 (1988). In *Adamson*, the court held the Arizona death penalty scheme unconstitutional:

> "While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that '[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect.' [Citation omitted]." 865 F.2d at 1043-44.

The above holding is strikingly similar to the majority opinion in this case. *Adamson and Walton* created a split, with the Ninth Circuit holding the Arizona death penalty scheme unconstitutional while the Arizona Supreme Court found it to be constitutional. The United States Supreme Court granted *certiorari* in *Walton* in order to resolve the conflict between *Walton and Adamson*. See *Walton*, 497 U.S. at 647, 110 S.Ct. 3047.

There are two parts of the *Walton* decision which are important to the resolution of this issue in this case: Parts III and IV. In Part III, the Court addressed Walton's contention that the Arizona statute violated the Eighth Amendment because it imposed a burden on defendants to establish mitigating circumstances sufficiently substantial to call for leniency. The Court quickly dispensed with this argument, stating:

> "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 650, 110 S.Ct. 3047.

While instructive, Part III, standing alone, is not determinative of our issue, as it is more concerned with the burden of proving mitigating circumstances rather than the weighing of mitigating and aggravating circumstances.

However, in Part IV, the *Walton* Court addressed the equipoise question raised by *Adamson*. The Court framed the issue as follows: "Walton insists that because [Arizona's statute] provides that the court 'shall' impose the death penalty if one or more aggravating circumstances are found and mitigating circumstances are held insufficient to call for leniency, the statute creates an unconstitutional presumption that death is the proper sentence." 497 U.S. at 651, 110 S.Ct. 3047. This is the equipoise argument, viz., that a statute requiring the imposition of a death sentence is unconstitutional where the mitigating circumstances do not outweigh or are equal to the aggravating circumstances. The Court rejected this argument, stating: "Our recent decisions in [*Blystone*] and [*Boyde*] foreclose this submission" and noting again that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve



a more rational and equitable administration of the death penalty.' " 497 U.S. at 651-52, 110 S.Ct. 3047.

Thus, the Court in *Walton* found that it was not unconstitutional for a statute to mandate death where aggravating circumstances are found and mitigating circumstances are insufficient to call for leniency, that is, under Arizona's interpretation, where the aggravating circumstances are not outweighed by the mitigating circumstances. That this was the holding of the majority in *Walton* is clearly demonstrated by the dissent in *Walton*. Justice Blackmun, joined by Justices Brennan, Marshall, and Stevens, dissented, arguing:

> "If the mitigating and aggravating circumstances are in equipoise, the [Arizona] statute requires that the trial judge impose capital punishment. The assertion that a sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case.' [Citation omitted.]" 497 U.S. at 687, 110 S.Ct. 3047.

In my opinion, the Court's decision in *Walton* settles the question of equipoise of aggravating and mitigating circumstances under the United States Constitution. Contrary to the majority, *Walton* makes it clear that as long as the statute does not preclude the sentencer from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating circumstances is left up to the States. See 497 U.S. at 650-52, 110 S.Ct. 3047.

The Ninth Circuit Court of Appeals has recognized that *Walton* overruled its *Adamson* decision regarding the constitutionality of the Arizona statute. See *Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir.1992). The Supreme Court of Illinois, in a case handed down immediately prior to *Walton*, presaged the *Walton* reasoning in rejecting the *Adamson* holding and the argument that its statute was

unconstitutional because it mandated death unless the mitigating circumstances outweighed the aggravating circumstances. *People v. Thomas*, 137 Ill.2d 500, 148 Ill.Dec. 751, 561 N.E.2d 57 (1990). The Illinois court found: "The United States Supreme Court has apparently put this argument to rest in [*Blystone*, 494 U.S. 299, 110 S.Ct. 1078]." 137 Ill.2d at 542, 148 Ill.Dec. 751, 561 N.E.2d 57. Later, the Idaho Supreme Court, citing Walton, found that its statute which required a defendant to provide mitigating circumstances which outweighed aggravating circumstances in order to avoid death, was constitutional. *State v. Hoffman*, 123 Idaho 638, 646-47, 851 P.2d 934 (1993).

The majority opinion on this issue echos the arguments made by Kleypas and his reliance upon the cases of *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987); *People v. Young*, 814 P.2d 834 (Colo.1991); and *Hulsey v. Sargent*, 868 F.Supp. 1090 (E.D.Ark.1993). None of these cases, in my opinion, are particularly persuasive.

*Biegenwald* was decided in 1987, and is thus pre-*Walton*. The language of the New Jersey statute examined in *Biegenwald* required the jury to sentence the defendant to death if it found an aggravating factor that was not outweighed by any one or more mitigating factors. The court found that "fundamental fairness" required that the defendant get the benefit of the doubt where "the explanations for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors)." 106 N.J. at 62, 524 A.2d 130. However, the *Biegenwald* court did not key this "fundamental fairness" to the United States Constitution but rather to "New Jersey's traditional concern for the rights of defendants charged with capital offenses" and its conviction that the legislature actually meant to enact legislation that requires the aggravating factors to outweigh the mitigating factors. See 106 N.J. at 58-67, 524 A.2d 130. The *Biegenwald* Court then proceeded to rewrite the New Jersey statute to say exactly the opposite of what the language said.



However, unlike the majority opinion in this case, the New Jersey Supreme Court based its decision on significant legislative history which indicated that the legislature might have been confused at to what weighing equation it actually intended to use. *Biegenwald*, based on New Jersey's notion of fundamental fairness and a tortured statutory interpretation, provides little, if any, authority for a conclusion that a weighing equation which requires mitigators to outweigh aggravators violates the United States Constitution.

The only two post-*Walton* cases providing some support for the majority are *Hulsey* and *Young*. Both cases address the precise question raised and conclude that the weighing equation mandating death where mitigating circumstances do not outweigh aggravating circumstances is unconstitutional.

*Hulsey* was a federal district court case decided by the Eastern District of Arkansas. In *Hulsey*, the petitioner sought habeas corpus relief from the former Arkansas death penalty statute which had been amended at the time of trial. The court found that the Arkansas death penalty statute was unconstitutional because it mandated death if mitigating circumstances did not outweigh aggravating circumstances. 868 F.Supp. at 1103. The court was concerned the following situation would violate due process:

> "If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be obliged to impose the death sentence since the mitigating circumstances would not be found to outweigh the aggravating." 868 F.Supp. at 1101.

Remarkably, the court in *Hulsey* did not attempt to distinguish or even mention *Walton*, which, as noted above, addressed this precise issue in Part IV of the opinion. Instead, *Hulsey* relied on the reasoning in *Adamson*, the case

*Walton* abrogated in reaching its decision. The *Hulsey* court stated:

> "Following the logic of the Ninth Circuit, the death presumption and burden shifting claims may be collapsed into one inquiry: whether the weighing equation as drawn 'offends federal due process by effectively mandating death.' The Court concludes that under the Arkansas statute under which petitioner was sentenced, it does." 868 F.Supp. at 1103.

It is highly questionable, in my opinion, whether *Hulsey*, with its reliance on *Adamson*, would have survived appellate review. However, the State's appeal in *Hulsey* was dismissed by the Eighth Circuit Court of Appeals because the State had failed to timely file its notice of appeal. See *Hulsey v. Sargent*, 15 F.3d 115, 118-19 (8th Cir.1994).

In *Young*, the Colorado Supreme Court interpreted the Colorado death penalty statute enacted in 1988. Under pre 1988 law, the Colorado statute required that the jury find that the aggravating factors were not outweighed by the mitigating factors and then further decide that death was the appropriate penalty in order to impose a death sentence. The 1988 law eliminated this last step and mandated a death sentence where the aggravating factors were not outweighed by the mitigating factors. The *Young* court, in declaring the death penalty statute unconstitutional, was very concerned with the elimination of the final step, stating:

> "The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury cannot determine with reliability and certainty that the death sentence is appropriate under the standards applied by the legislature. A statute that requires a death penalty to be imposed in such circumstances without the necessity for further deliberations, as does section 16-11-103(2)(b)(III), is fundamentally at odds with the requirement that the procedure produce a certain and



> reliable conclusion that the death penalty should be imposed.... A death sentence imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles. [Citations omitted.]" 814 P.2d at 845.

The *Young* court distinguished *Walton*, contending that *Walton* did not consider the question of whether a death sentence could be imposed when aggravators and mitigators are in equipoise. 814 P.2d at 845 n. 9. The court stated: "We do not believe that the United States Supreme Court cases can fairly be read to contain any suggestion that the death penalty can be imposed when the sentencer finds aggravating and mitigating considerations to be equally balanced." 814 P.2d at 846. However, as noted above, *Walton* approved the Arizona statute which mandated the death penalty where the mitigating circumstances did not outweigh the aggravating circumstances. See 497 U.S. at 650-52, 110 S.Ct. 3047.

The *Young* court misinterpreted Arizona's sentencing scheme. In reviewing United States Supreme Court decisions, the *Young* court stated: "The sentencer must also determine whether those mitigating factors are outweighed by the aggravating factors, *Boyde*, 110 S.Ct. at 1196; *Blystone*, 110 S.Ct. at 1083, or, stated alternatively, are sufficient to call for leniency, *Walton*, 110 S.Ct. at 3056." 814 P.2d at 846. Thus, the *Young* court lumped the Arizona statute at issue in *Walton* with the statutes in *Boyde* and *Blystone* as requiring the aggravating circumstances to outweigh the mitigating circumstances to impose death. A correct interpretation of the Arizona statute in *Walton* demonstrates that Arizona law required the mitigating circumstances to outweigh the aggravating circumstances in order to reject a death sentence. Had the *Young* court correctly interpreted the Arizona statute, viz, the way it was interpreted in *Walton*, it would have had a difficult time distinguishing *Walton* from the Colorado statute.

In any event, the *Young* court did not ultimately decide to base its decision on the United States Constitution. Rather, the court decided that if it was wrong in its understanding of federal precedent, it would hold that the Colorado sentencing scheme violated the Colorado Constitution and it, therefore, invalidated the scheme on state constitutional grounds. 814 P.2d at 845-46.

It should be noted that the Colorado Legislature in reaction to the *Young* decision, passed a new death penalty statute which still authorizes the death penalty where aggravating circumstances are not outweighed by mitigating circumstances, although it does not mandate it. Under the Colorado scheme, after a finding that the aggravating circumstances are not outweighed by mitigating circumstances, a panel of judges then determines whether the death penalty is the appropriate punishment for that particular case. Colo.Rev.Stat. § 16-11-103. The Colorado Supreme Court has determined that this procedure satisfies the problem it identified in *Young*. See *State v. Dunlap*, 975 P.2d 723, 736 (1999). Thus, it appears that the Colorado Supreme Court's objection to the statute at issue in *Young* was not that it authorized death where the aggravating circumstances are not outweighed by the mitigating circumstances but, instead, that it mandated death in that situation.

Since *Walton*, there has been only one case, *Hulsey*, which held that a statutory scheme providing for a sentence of death where mitigating circumstances do not outweigh aggravating circumstances was barred by the United States Constitution and its value is highly questionable. The language in the *Young* decision provides some support for the majority decision in this case, but the ultimate decision was based not on the United States Constitution but, rather, on the Colorado Constitution. Meanwhile, Arizona, Idaho, and Illinois have reached the opposite conclusion.



Since *Walton*, the United States Supreme Court has reaffirmed its earlier statements regarding the abilities of the states to enact their own weighing schemes. In *Harris v. Alabama*, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995), the Court faced the question of whether Alabama's death penalty statute was unconstitutional because it failed to give the trial judge any standards for accepting or rejecting the jury's advisory verdict of life or death. The Court found no violation, reemphasizing: "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.' " 513 U.S. at 512, 115 S.Ct. 1031. The Court also stated:

> "What purpose is served by capital punishment and how a State should implement its capital punishment scheme – to the extent that those questions involve only policy issues – are matters over which we, as judges, have no jurisdiction. Our power of judicial review legitimately extends only to determine whether the policy choices of the community, expressed through its legislative enactments, comport with the Constitution." 513 U.S. at 510, 115 S.Ct. 1031.

Similarly, in *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), the Court found that the Eighth Amendment did not require the sentencing jury to be instructed on particular mitigators or how to apply them, stating:

> "In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. [Citations omitted.] *However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence.* [Citations omitted.] *Our consistent concern has been that restrictions on the jury's sentencing determination not*

*preclude the jury from being able to give effect to mitigating evidence.*

"*But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence.*" (Emphasis added.)

The United States Supreme Court opinions on the subject make it clear that as long as a State's scheme allows the sentencer to give effect to mitigating evidence, the Eighth Amendment is satisfied. In *Walton*, the Court upheld a statute substantially similar to K.S.A. 21-4624 as constitutional, despite the fact that it mandated death where the mitigating circumstances did not outweigh the aggravating circumstances. Arizona has followed *Walton* and continues to apply its statute. Illinois and Idaho have relied on *Walton* and *Boyde* to hold their statutes constitutional notwithstanding that they also contain a Kansas-type of weighing equation which requires that aggravators are not outweighed by mitigators. The only post-*Walton* case which has affirmatively held that a statute violates the United States Constitution in mandating death where the mitigating circumstances do not outweigh the aggravating circumstances, *Hulsey*, is unpersuasive in that it does not mention *Walton* and instead relies on *Adamson*, which *Walton* abrogated. In *Young*, the Colorado Supreme Court decided the matter based on the Colorado Constitution rather than the federal one and misinterpreted the Arizona sentencing scheme in reaching that result.

For all the above reasons, I would hold that *Walton* is dispositive of the issues raised here and that the weighing equation contained in K.S.A. 21-4624(e) does not violate the United States Constitution.

Kleypas also contends that the weighing equation should be held unconstitutional under the Kansas Constitution. Based upon the majority decision, there was no need to address this argument. Based upon my dissent, there would be a need to



address Kleypas' claim. However, in doing so, I note that "[t]his court has never extended greater protection to our citizens beyond the federal guarantees." *State v. Spain*, 269 Kan. 54-59, 4 P.3d 621 (2000). As a result, I conclude that the weighing equation contained in K.S.A. 21- 4624(e) does not violate the Kansas Constitution.

McFARLAND, C.J., joins in the foregoing dissent.

ABBOTT, J., dissenting:

I concur with Justice Davis' dissent. I have no quarrel with anything in Justice Davis' dissent, which I consider to be excellent. I would merely add the following thoughts.

The American Law Institute Model Penal Code § 210.6(2) (1985) (adopting 1962 official draft) requires mitigating circumstances to outweigh aggravating circumstances. The Model Penal Code provides for a hearing either before a jury or before a judge, and the language indicates that if the sentencer finds one of the aggravating circumstances it still may not impose the death penalty unless it "further finds there are no mitigating circumstances sufficiently substantial to call for leniency." To me, this obviously requires the defendant to come forth with evidence of mitigating circumstances sufficiently substantial to call for leniency. It simply requires mitigating circumstances to outweigh the aggravating circumstances to prevent the death penalty from being imposed.

Justice Davis has thoroughly discussed the cases set forth below. I would rely on them.

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the Court stated:

"So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently

substantial to call for leniency." 497 U.S. at 650, 110 S.Ct. 3047.

Kleypas attempts to distinguish *Walton* on the basis that the Arizona statute does not mandate a death sentence if the sentencing court finds the aggravators and mitigators in equal balance. The Ninth Circuit Court of Appeals disagreed in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir.1988) (en banc) noting that "under the Arizona statute, the death sentence will be imposed unless mitigating circumstances *outweigh* the aggravating circumstances," and "in situations where the mitigating and aggravating circumstances are in balance ... the statute bars the court from imposing a sentence less than death." 865 F.2d at 1042 n. 50, 1043.

In *People v. Bean*, 137 Ill.2d 65, 147 Ill.Dec. 891, 560 N.E.2d 258 (1990), *cert. denied* 499 U.S. 932, 111 S.Ct. 1338, 113 L.Ed.2d 270 (1991), the court concluded:

> "The defendant does not alone have a burden of persuasion at this balancing stage, for the State is the movant, the party seeking the death penalty, and so bears the primary burden of persuading the jury that, as the statute states, there are no mitigating factors sufficient to preclude the sentencer from imposing the sentence of death for which the defendant is eligible. [Citation omitted.]" 137 Ill.2d at 139, 147 Ill.Dec. 891, 560 N.E.2d 258.

Further,

> "because this is a process of balancing intangibles, not of proving facts, it is improper to speak of defendants as having a 'burden.' After the State as movant has attempted to persuade the jury the death sentence should be imposed, a defendant may attempt to dissuade the jury from doing so. Whether defendant attempts to dissuade the jury, whether he decides to take up this burden, is up to him; the law does not require him to take it up." 137 Ill.2d at 140, 147 Ill.Dec. 891, 560 N.E.2d 258.



In *State v. Spain*, 263 Kan. 708, 725, 953 P.2d 1004 (1998), Spain was convicted and received a hard 40 sentence. His sentence was vacated and remanded. On remand, the trial court found one aggravating and one mitigating circumstance, and found them to be of equal weight. The trial court interpreted K.S.A.1999 Supp. 21-4635(c) to require a hard 40 sentence when aggravators and mitigators were in equipoise. Spain was sentenced to a term of 40 years without parole. See *State v. Spain*, 269 Kan. 54, 58, 4 P.3d 621 (2000).

On appeal, Spain argued that 21-4635(c) violated state and federal constitutional prohibitions against cruel and unusual punishment. He relied on death penalty cases, including *Hulsey v. Sargent*, 868 F.Supp. 1090 (E.D.Ark.1993); *People v. Young*, 814 P.2d 834 (Colo.1991); and *State v. Biegenwald*, 106 N.J. 13, 524 A.2d 130 (1987), to support his argument. The State, as it did here, relied on *Walton*.

This court pointed out that the court in *Young* interpreted the Colorado Constitution to provide broader protection under its cruel and unusual punishment clause than that offered by the Eighth Amendment to the United States Constitution. For that reason, this court noted, *Young* distinguished *Walton*. 269 Kan. at 59, 4 P.3d 621. In discussing *Walton*, this court stated:

> "In *Walton*, five justices agreed the Arizona death penalty statute did not create an unconstitutional presumption in favor of the death penalty. The statute at issue in *Walton* required imposition of the sentence of death if any aggravating circumstances were established and there were '"no mitigating circumstances sufficiently substantial"' to warrant leniency. [Citations omitted.] Although the language chosen by the Arizona Legislature does not include the terms 'weigh' or 'outweigh,' what the statute prescribes is a weighing process that results in imposition of the death penalty if the mitigating

circumstances are not of sufficient weight to tip the balance toward leniency.

"As previously noted, the Colorado Supreme Court interpreted its own constitutional provisions to grant greater protection than the comparable United States constitutional provision. Thus, *Walton* was not controlling. *In contrast, this court has never extended greater protection to our citizens beyond the federal guarantees.* [Citation omitted.]" (Emphasis added.) 269 Kan. at 59, 4 P.3d 621.

This court reaffirmed that death penalty cases are not controlling in hard 40 cases. 269 Kan. at 59, 4 P.3d 621. That said, this court quoted the following key passage from *Walton*:

"'So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.' " 269 Kan. at 60, 4 P.3d 621 (citing *Walton*, 497 U.S. at 650, 110 S.Ct. 3047).

As the Fourth Circuit Court of Appeals stated, in summarizing the relevant Supreme Court philosophy:

"The procedure involved in imposing the death penalty need not be structured to favor a defendant but need only avoid creating a fundamentally unfair trial. See *Barclay v. Florida*, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). The best of all procedural worlds is not guaranteed by the United States Constitution. *McGautha v. California*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971). In *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), the Supreme Court emphasized that in designing a constitutional capital punishment system, all that the state is required to provide is a meaningful basis for distinguishing between those



trials resulting in a penalty of death and those in which a penalty of life imprisonment is imposed. Under Zant, this is accomplished by simply identifying aggravating circumstances and requiring that one or more of them be found." *Rook v. Rice*, 783 F.2d 401, 406 (4th Cir.1986).

*Walton* echoes this basic philosophy and is the seminal case in this area. While the wording of the Arizona statute in *Walton* is not identical to that of the Kansas statute, the operation is the same. The United States Supreme Court's analysis bears repeating:

"So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 650, 110 S.Ct. 3047.

With this simple framing of the issue, it is clear that Kansas' statute passes constitutional muster. K.S.A. 21-4624(e) requires the State to prove one or more of the aggravating circumstances beyond a reasonable doubt. There is no burden on the defendant to prove mitigating circumstances; the jury may consider anything it considers a mitigating circumstance regardless of whether it has been "proven" or not. K.S.A. 21-4624(f) requires the court to review a death sentence imposed by a jury to ensure it is supported by the evidence. The fact that a death sentence results where aggravators and mitigators are found to be in equipoise does not lessen the State's burden to prove the existence of aggravating circumstances.

Kleypas fails to explain how the Kansas scheme precludes the sentencer from considering any mitigating evidence, much less how the Kansas scheme forces the jury to disregard such evidence. Clearly the Kansas scheme allows,

under K.S.A. 21-4624(e), consideration of *any* mitigating circumstances found to exist.

Justice Scalia's pointed concurring opinion in Walton concluded that guided discretion and individualized sentencing as set forth in the cases cannot be reconciled. The majority's treatment of the Arizona weighing equation, however, suggests that in an attempt to harmonize the two objectives, the Court has fashioned a safety valve of sorts. In effect, while holding in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), that the *substance* of mitigating evidence cannot be restricted beyond a determination of its relevance, the Court in subsequent cases stops short of an "anything goes" approach to the defendant's presentation of mitigating evidence by allowing the states to fashion the *procedure or method* by which mitigating evidence is considered. This is evident in *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), and *Franklin v. Lynaugh*, 487 U.S. 164, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988), where the Court refused to require a weighing equation, and in *Blystone v. Pennsylvania*, 494 U.S. 299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990), and *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), where the Court in summary fashion approved two states' formulations of a weighing equation. *Walton* is an extension of *Blystone* and *Boyde* in that the Court once again faced the task of evaluating a particular type of weighing equation, and it refused to delve into the mechanics of the equation, focusing instead on the more basic requirements of whether the sentencer was allowed to consider all relevant mitigating evidence.

The Court's development of Eighth Amendment jurisprudence on this issue suggests that the precise nature of any state's weighing equation is not at issue. The weighing equation is part of the procedural makeup of the death penalty decision, and as long as it operates within a scheme which allows full consideration of relevant mitigating



evidence, it is left to the broad discretion of the individual states.

In *Walton*, the Supreme Court did more than simply approve the particular wording of the Arizona weighing equation. It confirmed what its earlier decisions suggested – that the Eighth Amendment would be applied to the substance of the death penalty decision to ensure guided discretion and individualized consideration, but that procedural aspects, the weighing equation among them, would be left to the will of state legislatures. See *Tuilaepa v. California*, 512 U.S. 967, 980, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) (reiterating that the States are not constrained to "adopt a kind of mandatory sentencing scheme requiring a jury to sentence a defendant to death if it found, for example, a certain kind or number of facts, or found more statutory aggravating factors than statutory mitigating factors"); *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to any relevant mitigating evidence.... But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence."); *Campbell v. Blodgett*, 978 F.2d 1502, 1512-13 (9th Cir.1992).

The substance-procedure dichotomy thus renders unimportant the distinction, as raised by Kleypas, between the approved Arizona weighing equation and the Kansas weighing equation.

The balance of Kleypas' arguments can be characterized as general complaints about the inherent unfairness of allowing a "tie," or aggravators and mitigators found to be in equal balance, to result in a sentence of death. Kleypas couches this "tie goes to the State" argument in terms of a presumption of death and a burden on him to prove that his life should be spared. The visceral appeal of this argument is simply not supported by the Eighth Amendment.

Much of this appeal likely stems from thinking of the sentencing decision in terms of the State's burden during the guilt phase of a trial. It is clear, however, that the guilt phase and sentencing phase are distinct and subject to different rules. In *California v. Ramos*, 463 U.S. 992, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983), the United States Supreme Court rejected an analogy between the two phases, noting

> "the fundamental difference between the nature of the guilt/innocence determination ... and the nature of the life/death choice at the penalty phase.... In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar 'central issue' from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstance, the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." 463 U.S. at 1007-08, 103 S.Ct. 3446.

If the Kansas death penalty scheme meets the Eighth Amendment requirements of guided discretion and individualized sentencing, the details of the weighing equation should not operate to defeat the balance of the death penalty law under the federal Constitution. That the Kansas weighing equation may or may not differ from that of Arizona is of little consequence; it is a matter of procedure left to the discretion of the States.

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IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner*,

*vs.*

MICHAEL LEE MARSH II,

*Respondent*.

**On Petition for Writ of Certiorari to the Supreme Court of Kansas**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does a statute violate the Eighth Amendment if it provides for the death penalty to be imposed when the sentencing jury finds the aggravating and mitigating factors to be equal?

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IN THE

# Supreme Court of the United States

---

STATE OF KANSAS,

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MICHAEL LEE MARSH II,

*Respondent*.

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**BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI**

---

## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision below invalidates Kansas' death penalty based upon a misinterpretation of the Eighth Amendment. The court held that the possibility that a jury may impose death when the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

aggravating and mitigating factors are equal is inconsistent with this Court's Eighth Amendment jurisprudence. This erroneous interpretation frustrates the wishes of Kansas citizens in seeing their moral priorities vindicated through the criminal justice system. In addition, it may lead to the loss of innocent lives. This threat to public safety and the integrity of a state's criminal justice system is contrary to the interests that CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

On June 17, 1996, Michael Lee Marsh, the defendant, murdered Marry Anne Pusch and her 19-month-old daughter, Marry Elizabeth Pusch (M.P.), in their home in Wichita, Kansas. *State* v. *Marsh*, 102 P. 3d 445, 452 (Kan. 2004). Marry received multiple gunshot wounds to her head and was stabbed in the heart. See *ibid.* The house was burned down using an accelerant. M.P. was not harmed before the fire, but she was severely burned and died six days later. See *ibid.*

Marsh, a friend of Marry's husband, confessed to shooting Marry and abandoning M.P. after he fled the residence. See *ibid.* He had intended to go to the home, tie up Marry and M.P., and then threaten their lives to obtain money from Marry's husband for a trip to Alaska. See *id.*, at 453. Marry and M.P. arrived earlier than he expected, and Marsh panicked, killing Marry. See *ibid.* He equivocated about the fire, first admitting to setting it, then claiming he could not remember, and finally denying it. See *ibid.* There was substantial circumstantial evidence corroborating Marsh's confession, including Marry's blood on his shoes. See *ibid.* Marsh sought to submit circumstantial evidence tying Marry's husband to the crimes, but the trial court refused because the state's evidence against Marsh was direct. See *ibid.*

A jury convicted Marsh of the capital murder of M.P., first-degree murder of Marry, aggravated burglary, and aggravated arson. *Ibid.* The jury found three aggravating circumstances:



"(1) Marsh knowingly or purposely killed or created a great risk of death to more than one person; (2) he committed the crime in order to prevent a lawful arrest or prosecution; and (3) he committed the crime in an especially heinous, atrocious or cruel manner." *Ibid.*; see Kan. Stat. Ann. § 21-4625(2), (5), (6). Marsh was sentenced to death for murdering M.P., life with a minimum term of 40 years for Marry's murder, 51 months for aggravated arson, and 38 months for aggravated burglary. See 102 P. 3d, at 452.

The Kansas Supreme Court had previously determined that the Kansas death penalty statute as written could violate the Eighth Amendment, because it would allow a death sentence to be imposed where the aggravating and mitigating factors were equal, see *State* v. *Kleypas*, 40 P. 3d 139, 232 (2001), over a strong dissent. See *id.*, at 294-300 (Davis, J., dissenting) (relying primarily on *Walton* v. *Arizona*, 497 U. S. 639, 651-652 (1990) (plurality opinion), overruled on other grounds in *Ring* v. *Arizona*, 536 U. S. 584, 609 (2002)). The *Kleypas* Court did not strike the Kansas death penalty law, but instead allowed trial courts to avoid this supposed defect through jury instructions that changed the wording of the statute. See *id.*, at 233-234.

In the present case, the majority refused to reconsider the first holding of *Kleypas*, insisting that this Court "has never squarely addressed or decided the facial constitutionality of the equipoise provision before us." *Marsh*, 102 P. 3d, at 459. The Kansas Supreme Court then went on to overrule the second holding of *Kleypas*. The court held that Kansas' death penalty law could not be construed to avoid the purported Eighth Amendment violation, and struck down the death penalty in that state. See *id.*, at 464. The Kansas Supreme Court also reversed Marsh's conviction for murdering M.P., because the trial court erroneously excluded circumstantial evidence that tied the husband to the crimes. See *id.*, at 456-457. It affirmed the convictions and sentence for aggravated burglary and the

murder of Marry, but ordered a new trial on the capital murder and aggravated arson counts. *Id.*, at 466.

## SUMMARY OF ARGUMENT

In addition to misinterpreting the Eighth Amendment and conflicting with the decisions of other jurisdictions, the decision of the Kansas Supreme Court involves a particularly important federal issue. Sentencing involves complex utilitarian policies such as deterrence, rehabilitation, and education. More importantly, sentencing reflects the moral priorities of society. Most people obey the law not because they fear getting caught, but because the system is just. The freedom to punish as severely as society sees fit is an essential component to this sense of justice in the system. Courts should tread with particular care in sentencing cases, but this is absent from the Kansas Supreme Court's opinion.

The present case runs roughshod over Kansas' sentencing system. Capital punishment has an importance that far outweighs its relative infrequency. Sitting at the apex of punishment, it establishes moral priorities that resonate throughout the system. Invalidating the entire death penalty upsets the punishment system's equilibrium.

The Kansas Supreme Court's decision may also threaten public safety. Recent studies substantially bolster the case for the deterrent value of capital punishment. Advanced statistical and econometric analysis indicates that each execution lowers the murder rate, saving up to 18 lives per year, while taking people off of death row may increase the murder rate. Although not conclusive, these studies raise significant public safety concerns about the Kansas decision. Combined with the frustration of the public's will, these factors alone justify certiorari.

The fact that the defendant's capital murder conviction has been reversed does not deprive this Court of the final judgment



necessary for its jurisdiction. If the case is not reviewed now, then Marsh is likely to be retried under a system without a death penalty. This will prevent review of the Kansas Supreme Court's Eighth Amendment ruling because he will not receive a death sentence on retrial. That threat provides the necessary finality for jurisdiction.

## ARGUMENT

This Court usually grants certiorari review only where there is an important federal issue and a conflict between jurisdictions, an important federal question that this Court has not addressed, or an important federal question decided in a way that conflicts with this Court's decisions. See Supreme Court Rule 10. The petition for writ of certiorari demonstrates that the Kansas Supreme Court in this case misinterpreted this Court's Eighth Amendment jurisprudence in a way that conflicts with decisions of federal circuit courts and state supreme courts. See Petition for Writ of Certiorari 5-10. *Amicus* will not repeat these arguments. Instead, it will focus on the importance of the federal issues involved. Because the Kansas Supreme Court invoked the Eighth Amendment to invalidate capital punishment in Kansas, this case necessarily involves important federal issues.

The state court's decision (in *Kleypas*) or refusal (in the present case) to interpret a statute to avoid a perceived conflict with federal law is a question of state law. However, that perception of conflict is a federal question, within this Court's jurisdiction to review. See, *e.g.*, *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P. C.*, 467 U. S. 138, 152 (1984); *Ohio* v. *Reiner*, 532 U. S. 17, 20 (2001) (*per curiam*); R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 199-200 (8th ed. 2002).

## I. Setting the appropriate level of punishment is one of the most essential functions of government.

The decision of the Kansas Supreme Court to invalidate the death penalty in Kansas, see *State* v. *Marsh*, 102 P. 3d 445, 464 (2004), strikes at one of the essential functions of government. Few policies are more important to society than setting the level of punishment for crimes. Punishment serves important crime limitation policies and expresses society's fundamental values. Decisions that limit society's freedom to punish as it sees fit necessarily involve important issues. These issues are more worthy of the Court's consideration than less important cases.

Criminal justice is a field in which courts should tread with particular care. "The most basic function of any government is to provide for the security of the individual and his property." *Miranda* v. *Arizona*, 384 U. S. 436, 539 (1966) (White, J., dissenting), quoted in *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). Punishment is integral to any crime prevention scheme "to influence human conduct away from the undesirable and toward the desirable." 1 W. LaFave & A. Scott, Substantive Criminal Law § 1.5(a), p. 37 (2d ed. 2003). Criminal law cannot exist without punishment.

There are several utilitarian justifications for punishment, such as deterrence, restraint, and rehabilitation. See *id.*, at 37-47. While punishment serves all of these functions, they do not completely explain why we must punish criminals and why society needs the freedom to impose the punishment that it deems appropriate. Even with the renewed public emphasis on law enforcement, many perpetrators face little risk of being caught, let alone punished. It has been estimated that one who commits a homicide has a 44.7% chance of being caught, convicted, and imprisoned, while rapists have a 12% chance and robbers a 3.8% chance of being punished for their crimes. See Robinson & Darley, The Utility of Desert, 91 Nw. U. L. Rev. 453, 459 (1997). Lesser crimes are even less likely to be punished with punishment being "a 100-to-1 shot"



for crimes like burglary, assault, and larceny." *Ibid.* Since offenders tend to underestimate their chance of getting caught, this problem is compounded. See *id.*, at 460. Since some offenders cannot be deterred, or believe that they will not be caught, deterrence is only an incomplete explanation for punishment. Similar criticisms can be raised against the other utilitarian rationales for punishment. Incapacitation is completely effective only for the comparatively rare severe sentences, and rehabilitation as the primary goal has been rejected by many, including Congress. See Miller, Purposes at Sentencing, 66 S. Cal. L. Rev. 413, 434-435 (1992). While these policy goals are still important, sentencing also serves another purpose.

In addition to restraining crime, sentencing expresses society's fundamental values. This Court's Eighth Amendment jurisprudence recognizes the important role that retribution plays in systems of punishment. See, *e.g.*, *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (lead opinion); *Ewing* v. *California*, 538 U. S. 11, 25 (2003); *Hudson* v. *United States*, 522 U. S. 93, 101 (1997) (one of the "traditional goals of punishment"). Retribution is not merely sating the public's thirst for vengeance. Instead, it is part of the glue which holds society together.

The fact that most people obey the law indicates that something more than deterrence prevents crime. Personal morality helps to explain why most of us are not criminals. See T. Tyler, Why People Obey the Law 44-45 (1990). Punishment serves society by setting and vindicating its moral priorities.

This mix of policy and morality makes judicial review of sentencing particularly difficult. Preventing a particular penalty or form of punishment interferes with society's ordering of moral priorities that establishes its sense of justice in the criminal law. A system that does not punish criminals with the severity that society deems appropriate loses some of the respect that helps maintain public order. The moral questions

inherent in sentencing can only be answered by the people through their legislature. See *Gregg*, 428 U. S., at 175.

The policy questions of deterrence, incapacitation, rehabilitation, and other factors further complicate constitutional review of sentencing. While there is a tradition of a judicial role in choosing a sentence for a particular criminal from a range of alternatives, see *Koon* v. *United States*, 518 U. S. 81, 113 (1996), the determination of what sentencing considerations are appropriate are " 'peculiarly questions of legislative policy.' " *Gregg*, 428 U. S., at 176 (quoting *Gore* v. *United States*, 357 U. S. 386, 393 (1956)). While the Eighth Amendment confers jurisdiction to review sentences and sentencing procedures, courts should take care in these cases. The complex policies, vital public interests, and the important moral questions surrounding sentencing all counsel for a judicial caution that is absent from the decision below.

This Court's often tangled and contentious Eighth Amendment jurisprudence demonstrates the inherent complexity of the constitutional law of sentencing. The noncapital proportionality review cases are so conflicted that there is little clearly established precedent. See *Lockyer* v. *Andrade*, 538 U. S. 63, 72-73 (2003). There is also considerable tension in Eighth Amendment death penalty procedure. The mitigation and guided discretion requirements of Eighth Amendment capital punishment law are inherently conflicted. See *Graham* v. *Collins*, 506 U. S. 461, 479 (1993) (Thomas, J., concurring). If constitutional review of sentencing is problematic for this Court, it is necessarily difficult for the lower courts. If the states and the federal circuits are to review sentencing cases, then frequent guidance from this Court is essential to a healthy body of law.

That need is particularly acute in the present case. While all sentencing decisions are important, some are more important than others. This case raises vital issues that warrant this Court's review.



## II. A decision invalidating a state's entire capital punishment system particularly deserves review by this Court.

This case stands at the apex of importance in sentencing cases. The Kansas Supreme Court did not just invalidate a single sentence or a trivial part of Kansas' sentencing scheme. In striking down Kansas' death penalty, the state Supreme Court cut the top off of Kansas' punishment system. Although it is one of the least used punishments, the death penalty is much more important than its relative infrequency suggests. The death penalty establishes moral priorities that resonate through the entire system. In addition, this decision deprives Kansas of a potentially powerful deterrent to murder that can save innocent lives. These compelling considerations strongly counsel in favor of certiorari review.

### *A. Moral Priorities.*

When a court strikes down a legislatively enacted punishment, it interferes with society's ordering of moral priorities that establishes its sense of justice in the criminal law. This problem is exacerbated in the context of the death penalty. Since it is reserved for the most severe crimes, and is the most severe punishment, capital punishment is morally the most important punishment in a system that employs it.

As the most severe and by far the most publicized punishment, the death penalty sets an example that resonates throughout the justice system and society. It expresses society's ultimate revulsion at the crime it considers the worst. See *Gregg* v. *Georgia*, 428 U. S. 153, 183 (1976) (lead opinion). The particular importance of capital punishment to those jurisdictions that employ it is reflected in the overwhelming response of the states to *Furman* v. *Georgia*, 408 U. S. 238 (1972). After *Furman* invalidated all the then-existing capital punishment laws, the reaction was overwhelming with 35 states enacting new capital punishment laws. See *Gregg*, *supra*, at 179-180, and n. 23. The *Furman* decision also changed public

opinion on the death penalty in an unexpected direction. A prior long-term decline in support for capital punishment suddenly and dramatically reversed after *Furman*. See Scheidegger, Capital Punishment in 1987, The Puzzle Nears Completion, 15 West. St. L. Rev. 95, 107 (1987). This change influenced the decision to allow the death penalty to be reinstated in *Gregg*. See 428 U. S., at 179 (lead opinion) ("it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction").

A similar reaction to the decision below is taking place in Kansas. Bills to change Kansas death penalty law are coursing through the legislature, and the decision has spawned a movement to change how Supreme Court and Court of Appeals judges are selected, see S. Painter, Death penalty bills hit Senate, The Wichita Eagle (Feb. 8, 2005), http://www.kansas.com/mld/kansas/news/legislature/10842120.htm, although that effort is on hold pending this Court's decision on certiorari in this case. See Associated Press, Penalty's revival urged, The Topeka Capital-Journal (Feb. 23, 2005), http://legislature.cjonline.com/stories/022305/leg_deathpen.shtml. The State Senate has even adopted a resolution asking the Court to grant certiorari in this case. See Appendix. While legislation may reinstate Kansas' death penalty in the long term, the immediate consequence is to destroy what the people of Kansas intended. Even if the death penalty is reinstated, the Ex Post Facto Clause, see U. S. Const., Art. I, § 10, cl. 1, or double jeopardy may prevent capital punishment from being applied to crimes committed before the restoration. If the present case is not reversed by this Court, then Kansas may forever lose the opportunity to apply the ultimate sanction to several of its worst criminals, including a quadruple murderer. See T. Rizzo & D. Klepper, Kansas justices rule death penalty unconstitutional, The Kansas City Star (Dec. 17, 2004), http://www.kansascity.com/mld/kansascity/news/nation/10444309.htm. The present case is Kansas' own *Furman*. Given how central capital punishment is to the moral order of punishment



decision, this drastic result deserves extra consideration from this Court.

*B. Lost Deterrence.*

The present case may not just cost Kansas its moral priorities in sentencing. It may also cost innocent lives. Since *Furman*, there has been a sharp dispute over the deterrent effect of capital punishment. See Sunstein & Vermeule, Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs, AEI-Brookings Joint Center for Regulatory Studies, Working Paper 05-06, p. 7 (Mar. 2005), http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1131. Recent studies considerably bolster the case for capital punishment's deterrence. The leading study looked at data from 3,054 United States counties between 1977 and 1996, see Dezhbakhsh, Rubin, & Shepherd, Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data, 5 Am. L. & Econ. Rev. 344, 359 (2003), and found that death sentences and executions substantially reduce the murder rate. The authors estimated that each execution led to 18 fewer murders. See *id.*, at 369.

Other recent studies find a similar relationship between capital punishment and deterrence. A study of capital punishment at the state level since 1978 estimates that each execution deters an average of 14 murders. See Zimmerman, State Executions, Deterrence, and the Incidence of Murder, 7 J. Applied Econ. 163, 190 (2004). Another study of state level data between 1977 and 1997 estimates that each execution deters about 5 murders. See Mocan & Gittings, Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment, 46 J. L. & Econ. 453, 474 (2003). The authors also find that removing people from death row and commutations increase the murder rate. See *ibid.* Other research shows a weaker, but still statistically significant relationship between capital punishment and the murder rate. See Yunker, A New Statistical Analysis of Capital Punishment

Incorporating U. S. Postmoratorium Data, 82 Soc. Sci. Q. 297, 310-311 (2001) (using national data, the deterrent "effect is statistically significant at a high level of confidence . . .").

While criminology is not nearly as exact as the hard sciences, support for the deterrent effect of capital punishment is much stronger now than when *Furman* was decided. Since the concept of deterrence is consistent with basic human nature, opponents of the deterrent value of the death penalty have to meet a considerable burden of proof. They have not met this. Striking down Kansas' death penalty, even if subsequently remedied by the state legislature, may cost the lives of innocent Kansans. The potential consequences of the Kansas Supreme Court's decision justify certiorari on their own, and they are certainly sufficient to tip the balance when there are substantial constitutional issues and a conflict between jurisdictions.

The claim that "death is different" is a common justification for imposing greater procedural restrictions in capital sentencing. See, *e.g.*, *Gardner* v. *Florida*, 430 U. S. 349, 357-358 (1977); *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality). If this is the case, then decisions striking down a state's capital punishment system should also be treated differently. When the federal Constitution is invoked to eliminate the most important punishment in a state, this Court should pay particular attention. Given the substantial federal questions and the conflict between jurisdictions spelled out in the petition for writ of certiorari; the case for certiorari is compelling.

### III. The reversal of the capital murder conviction does not preclude certiorari review.

The Kansas Supreme Court reversed Marsh's conviction for capital murder and aggravated arson. See *supra*, at 3. This does not deprive the case of the final judgment necessary for certiorari jurisdiction. See 28 U. S. C. § 1257(a). While Marsh will be retried for capital murder, he will not be subject to the



reimposition of his death sentence because the Kansas Supreme Court invalidated Kansas' death penalty law under the Eighth Amendment. The Kansas Supreme Court's ruling that the state death penalty law is invalid under the Eighth Amendment is therefore final with respect to Marsh.

If Marsh is retried and sentenced without a valid death penalty law then a death sentence cannot be imposed on him. In that case, double jeopardy prevents the reimposition of capital punishment if Kansas' death penalty is subsequently revived through legislation. See *supra*, at 10. When further proceedings could effectively immunize the constitutional issue from further review, such as by acquittal, finality does not prevent immediate review. See *California* v. *Stewart*, decided with *Miranda* v. *Arizona*, 384 U. S. 436, 498, n. 71 (1966). There is a much greater risk of losing the federal issue in this case, so the Eighth Amendment ruling is final.

The possibility of Kansas reviving its death penalty law before Marsh's retrial is too remote to influence the jurisdiction issue. Legislative efforts to deal with the Kansas Supreme Court's decision have been put on hold, pending this Court's disposition of the case. See *supra*, at 10. In the unlikely event that a new death penalty law could be refashioned in time for Marsh's retrial, imposing this new law on him would raise a double jeopardy issue. See *Dobbert* v. *Florida*, 432 U. S. 282 (1977). If this Court does not grant certiorari, then there is a substantial chance that the state will be precluded from imposing the death penalty against Marsh due to the Kansas Supreme Court's misinterpretation of the Eighth Amendment. Finality requires nothing more.

## CONCLUSION

The petition for writ of certiorari should be granted.

April, 2005

Respectfully submitted,

CHARLES L. HOBSON

*Attorney for Amicus Curiae*
*Criminal Justice Legal Foundation*

## APPENDIX

SENATE RESOLUTION No. 1820

A RESOLUTION requesting the United States supreme court to grant certiorari and reverse the Kansas supreme court's ruling in *State v. Marsh*.

WHEREAS, The current Kansas death penalty law was enacted in 1994 and was challenged in *State v. Kleypas*, 272 Kan. 894, decided by the Kansas supreme court December 28, 2001; and

WHEREAS, The Kansas supreme court unanimously affirmed Kleypas' conviction but set aside his death sentence because of a faulty jury verdict form; and

WHEREAS, The *Kleypas* court split 4-3 on a constitutional challenge to the death penalty statute based on the manner in which jurors were instructed to weigh aggravating and mitigating circumstances when deciding whether to impose a death sentence, but all seven Kansas justices in the *Kleypas* court found the Kansas death penalty law to be constitutional, either on its face or as construed; and

WHEREAS, The *Kleypas* majority, consisting of Justices Tyler C. Lockett, Donald L. Allegrucci, Fred N. Six, and Edward Larson, did not invalidate the Kansas death penalty statute, but held that the so-called ''weighing equation,'' as applied, was unconstitutional: ''Our decision does not require that we invalidate K.S.A. 21-4624 or the death penalty itself. We do not find K.S.A. 21-4624(e) to be unconstitutional on its face, but rather, we find that the weighing equation impermissibly mandates the death penalty when the jury finds that the mitigating and aggravating circumstances are in equipoise.''; and

WHEREAS, The *Kleypas* dissent, written by Justice Davis and joined by Chief Justice McFarland and Justice Abbott, did not invalidate the Kansas death penalty statute because ''the weighing equation was constitutional as written.'' The dissent further noted that the United States supreme court has held that

as long as the weighing equation does not preclude the jury from considering relevant mitigating evidence, the specific method of balancing the aggravating and mitigating factors may be left up to the state; and

WHEREAS, In reaching the decision, the court reasoned that the Kansas legislature intended to enact a constitutional death penalty law and thus concluded that K.S.A. 21-4624(e) is not void on its face, but only in its application. The majority held that by requiring the ''tie'' to go to the defendant, the intent of the legislature may be carried out in a constitutional manner: ''By simply invalidating the weighing equation and construing K.S.A. 21-4624(e) to provide that if the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist, the defendant shall be sentenced to death, the intent of the legislature is carried out in a constitutional manner. So construed, we hold that K.S.A. 21-4624 does not violate the eighth amendment prohibition against cruel and unusual punishment,'' the court concluded; and

WHEREAS, The *Kleypas* court held that the wording of a verdict form was confusing, misleading and inconsistent with Kansas law and improperly implied to a jury that the jury, in order to spare Kleypas' life, was required to be unanimous in its decisions against death. To cure that infirmity, the court provided substitute language for verdict forms to be used in all death penalty cases in Kansas. The revised verdict form, consistent with Kansas law, makes it clear that a single juror may block a death verdict; and

WHEREAS, After the *Kleypas* case was decided, both the senate judiciary committee and the house judiciary committee conducted hearings regarding the *Kleypas* decision and the Kansas death penalty law. In addition to hearings during the 2002 legislative session, the matter was studied further during interim committee hearings in the autumn of 2004. The focus



of the hearings was to determine what legislative response, if any, was needed to ensure the constitutionality of the Kansas death penalty law in light of the *Kleypas* decision; and

WHEREAS, Based on testimony received during those hearings, the legislature relied on the *Kleypas* court's decision and concluded that no amendment to statute was necessary because the *Kleypas* court has upheld the constitutionality of the death penalty statute and had cured the apparent flaw in the weighing equation by revising future jury instructions; and

WHEREAS, Only three years after deciding the *Kleypas* case the Kansas supreme court decided *State v. Marsh*, opinion number 81,135, on December 17, 2004; and

WHEREAS, In *Marsh*, the supreme court ruled 4-3 that the Kansas death penalty statute is unconstitutional because of its inclusion of the ''weighing equation'' - the same defect that the supreme court purported to cure with the prospective change in jury instructions it ordered in *Kleypas*; and

WHEREAS, In *Marsh*, the majority agrees with the four justices who decided in 2001's *State v. Kleypas* that the statute as written violated the eighth and fourteenth amendments but, unlike in *Kleypas*, the *Marsh* majority proceeded to invalidate the entire statute rather than severing the weighing equation provision from the remainder of the statute and allowing a change in jury instructions to cure the flaw; and

WHEREAS, The three justices who dissented in *Marsh* (Justice Davis, Chief Justice McFarland and Justice Nuss) continue to believe the death penalty statute, as written, is constitutional: ''There seems to be a general feeling among the majority that the weighing equation which mandates death in the highly unlikely event that the jury finds the aggravating and mitigating factors to be exactly equal in weight is somehow 'unfair.' While it is certainly within the province of this court to interpret the eighth amendment, we cannot do so in a vacuum. We cannot simply rely on our inchoate feelings, but

instead have a duty to examine, analyze, and apply the United States supreme court's jurisprudence on the matter.''; and

WHEREAS, The *Marsh* majority states that the United States supreme court has never directly addressed the issue of the weighing equation presented in *Kleypas* and again in *Marsh*; and

WHEREAS, Chief Justice McFarland says in her separate dissent that legally the Court should follow the *Kleypas* precedent: ''In *Kleypas*, in a 4 to 3 decision, all seven justices agreed the Kansas death penalty law was constitutional, either as construed in a very minor respect (majority) or as written (dissent). To now strike down the Kansas death penalty law, is, in my opinion, wholly inappropriate and unjustified.''; and

WHEREAS, Justice Nuss also writes separately and says the United States supreme court has already implicitly approved of the death penalty sentencing scheme adopted in Kansas. In his opinion, an Arizona weighing equation ''functionally identical'' to the Kansas equation was approved by the United States supreme court in its 1990 *Walton v. Arizona* decision, and *Walton* therefore controls the result in *Marsh*; and

WHEREAS, It may be beyond the power of the legislature to amend the Kansas statute retroactively in order to apply a clearly constitutional death penalty law to the seven persons now on death row. Only a decision by the United States supreme court to overturn the Kansas supreme court's decision in *Marsh* is likely to result in the continued application of the death penalty law to those persons already sentenced to death; and

WHEREAS, The State of Kansas finds itself in this predicament not because of any change in the death penalty law but because of a change in the composition of the Kansas supreme court between the *Kleypas* and *Marsh* decisions; and

WHEREAS, Manifest injustice will result if the United States supreme court declines to review the *Marsh* case on appeal; and



WHEREAS, We believe that the Kansas death penalty law meets the requirements of the Kansas constitution and the United States constitution: Now, therefore,

*Be it resolved by the Senate of the State of Kansas:* That, based on the evidence presented, we do hereby acknowledge and affirm that the opinion of the Kansas senate is that the Kansas death penalty law as written is constitutional and that if any single provision of that law is found to be unconstitutional that provision should be severed from the rest and other provisions of the statute upheld; and

*Be it further resolved:* That, the Kansas supreme court and the United States supreme court should be informed that the Kansas legislature relied on the Kansas supreme court's decision in *State v. Kleypas* in deciding not to amend the Kansas death penalty law to alter the weighing equation provisions during hearings in 2002 and 2004; and

*Be it further resolved:* That, the Kansas senate respectfully requests that United States supreme court grant certiorari to hear the *Marsh* case and find Kansas death penalty law constitutional as written or, in the alternative, as applied through the cure imposed by the Kansas supreme court in the *Kleypas* decision.

Senate Resolution No. 1820 was sponsored by Committee on Judiciary.

I hereby certify that the above RESOLUTION originated in the SENATE, and was adopted by that body

_____

_____

President of the Senate.

_____

Secretary of the Senate.

Supreme Court, U.S.
FILED
APR 4 - 2005
OFFICE OF THE CLERK

04-1170

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**IN THE SUPREME COURT OF THE UNITED STATES**

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STATE OF KANSAS,
*Petitioner,*

*v.*

MICHAEL LEE MARSH II,
*Respondent.*

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MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

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Respondent, Michael Lee Marsh II, through the undersigned counsel, asks leave to file the attached Brief in Opposition to the Petition for Writ of Certiorari and to proceed *in forma pauperis*.

Mr. Marsh was declared indigent prior to his trial, in 1996. He has remained indigent and was represented by court-appointed counsel both in the trial court and the Kansas Supreme Court below.

Because of Mr. Marsh's poverty, he is unable to pay the costs of these proceedings or give security therefor. An affidavit from Mr. Marsh in support of this motion is attached hereto.

Respectfully submitted,

REBECCA E. WOODMAN
*Counsel of Record*
CAPITAL APPELLATE DEFENDER OFFICE
700 Jackson, Suite 903
Topeka, Kansas 66603
(785) 368-6587

*Attorney for Respondent*

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

| | | |
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| STATE OF KANSAS, Petitioner, | ) | |
| vs | ) | Case No. 04-1170 |
| MICHAEL LEE MARSH II, Respondent. | ) | |

Respondent's Declaration in Support of Motion for Leave to Proceed *In Forma Pauperis*

**Declaration in Support of Motion**

I swear or affirm under penalty of perjury that, because of my poverty, I cannot prepay any costs or fees in responding to the Petition for Certiorari or post a bond for them. I believe I am entitled to proceed *in forma pauperis*. I swear or affirm under penalty of perjury under United States laws that my answers on this form are true and correct. (28 U.S.C. § 1746; 18 U.S.C. § 1621.)

Signed: Michael Marsh

**Instructions**

Complete all questions in this application and then sign it. Do not leave any blanks: if the answer to a question is "0," "none" or "not applicable (N/A)," write in that response. If you need more space to answer a question or to explain your answer, attach a separate sheet of paper identified with your name, your case's docket number, and the question number.

Date: 8 March 2005

1 For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise

| **Income source** | **Average Monthly Amount during the past 12 months** | | **Amount Expected next month** | |
|---|---|---|---|---|
| | **You** | **Spouse** | **You** | **Spouse** |
| Employment | $ | $ | $ | $ |
| Self-employment | $ | $ | $ | $ |
| Income from real property (such as rental income) | $ | $ | $ | $ |
| Interest and dividends | $ | $ | $ | $ |
| Gifts | $ | $ | $ | $ |
| Alimony | $ | $ | $ | $ |
| Child support | $ | $ | $ | $ |
| Retirement (such as social security, pensions, annuities, insurance) | $ | $ | $ | $ |

| Income source | Average Monthly Amount during the past 12 months | | Amount Expected next month | |
|---|---|---|---|---|
| | **You** | **Spouse** | **You** | **Spouse** |
| Disability (such as social security, insurance payments) | $ | $ | $ | $ |
| Unemployment payments | $ | $ | $ | $ |
| Public assistance (such as welfare) | $ | $ | $ | $ |
| Other(specify) | $ | $ | $ | $ |
| **Total monthly income:** | $ | $ | $ | $ |

2. List your employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

| Employer | Address | Dates of employment | Gross monthly pay |
|---|---|---|---|
| | | | |
| | | | |
| | | | |
| | | | |
| | | | |

3 List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions )

| Employer | Address | Dates of employment | Gross monthly pay |
|---|---|---|---|
| N/A | | | |
| | | | |
| | | | |
| | | | |
| | | | |

4. How much cash do you and your spouse have? $ N/A

Below, state any money you or your spouse have in bank accounts or in any other financial institution.

| Financial institution | Type of account | Amount you have | Amount your spouse has |
|---|---|---|---|
| N/A | | | |
| | | | |
| | | | |
| | | | |

**If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.**

5. List the assets, and their values, which you own or your spouse owns Do not list clothing and ordinary household furnishings.

**Home (Value)**

N/A

**Other real estate (Value)**

N/A

**Motor Vehicle #1 (Value)**

Make & year: N/A

Model: _____

Registration # _____

**Motor Vehicle #2 (Value)**

Make & year: N/A

Model: _____

Registration # _____

**Other assets (Value)**

N/A

6. State every person, business or organization owing you or your spouse money, and the amount owed.

| **Person owing you or your spouse money** | **Amount owed to you** | **Amount owed to your spouse** |
|---|---|---|
| N/A | | |
| | | |
| | | |

7. State the persons who rely on you or your spouse for support.

| **Name** | **Relationship** | **Age** |
|---|---|---|
| N/A | | |
| | | |
| | | |

8 Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate

| | You | Your Spouse |
|---|---|---|
| Rent or home-mortgage payment (include lot rented for mobile home)<br>Are real estate taxes included? Yes ____ No ____<br>Is property insurance included? Yes ____ No ____ | $ | $ |
| Utilities (electricity, heating fuel, water sewer, and telephone) | $ | $ |
| Home maintenance (repairs and upkeep) | $ | $ |
| Food | $ | $ |
| Clothing | $ | $ |
| Laundry and dry-cleaning | $ | $ |
| Medical and Dental expenses | $ | $ |
| Transportation (not including motor vehicle payments) | $ | $ |
| Recreation, entertainment, newspapers, magazines, etc | $ | $ |

| | You | Your Spouse |
|---|---|---|
| Insurance (not deducted from wages or included in mortgage payments) | | |
| Homeowner's or renter's | $ | $ |
| Life | $ | $ |
| Health | $ | $ |
| Motor vehicle | $ | $ |
| Other _____ | $ | $ |
| Taxes (not deducted from wages or included in mortgage payments) (specify: _____) | $ | $ |
| Installment payments | | |
| Motor vehicle | $ | $ |
| Credit card(name)_____ | $ | $ |
| Department store(name)_____ | $ | $ |
| Other _____ | $ | $ |
| Alimony, maintenance, and support paid to others | $ | $ |

| | You | Your Spouse |
|---|---|---|
| Regular expenses for operation of business, profession or farm (attach detailed statement) | $ 0 | $ 0 |
| Other (specify) | $ 0 | $ 0 |
| **Total monthly expenses** | $ 0 | $ 0 |

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

___Yes _X_ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying - an attorney any money for services in connection with this case, including the completion of this form?

___Yes _X_ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

N/A

_____

_____

_____

11. Have you paid - or will you be paying - anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

____Yes ___No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

_____

_____

_____

_____

12. Provide any other information that will help explain why you cannot pay the docket fees for your appeal.

N/A

13. State the address of your legal residence:

[illegible] Eldorado Correctional Facility

P.O. Box 311 Central

El Dorado Kansas 67042

Your daytime phone number: (____) [illegible]

Your age 24 Your years of schooling: 12

Your social security number: 050 70 9542

ORIGINAL

Supreme Court, U.S.
FILED
APR 4 - 2005
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04-1170

IN THE

SUPREME COURT OF THE UNITED STATES

STATE OF KANSAS,

*Petitioner,*

*v.*

MICHAEL LEE MARSH II,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas**

# BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## STATUTORY PROVISION INVOLVED

28 U.S.C. § 1257(a) provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

## STATEMENT OF THE CASE

Michael Marsh's direct appeal was docketed in the Kansas Supreme Court in May, 1998, one month after the direct appeal in *State v. Kleypas* was docketed in the same court.[1] Subsequent to the filing of the appellant's brief in *Kleypas*, Mr. Marsh drafted an appellate brief which, in addition to raising issues unique to his case, raised several issues already briefed in *Kleypas*, including a challenge to the constitutionality of the equipoise formula set forth in K.S.A. 21-4624(e).[2] However, the Kansas Supreme Court rejected Mr. Marsh's brief as too lengthy, and directed him to file a shorter brief.

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[1] The Kansas Supreme Court's docketing lists for the Marsh case (No. 81135) and the Kleypas case (No. 80920) are published online at:
http://intra.kscourts.org:7780/pls/coa/clerks_office.request_case.

[2] Mr. Marsh raised this constitutional claim in the trial court, which denied it. At that time, the State of Kansas argued that the statutory weighing equation was constitutional under *Walton v. Arizona*, 497 U.S. 639 (1990).

Mr. Marsh then filed a motion to stay the briefing schedule pending a decision in *Kleypas*. The Kansas Supreme Court granted this motion.[3]

A decision was issued in the *Kleypas* case in December, 2001. *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), *cert. denied* 537 U.S. 834 (2002), set forth in the Appendix to the Petition for Certiorari ("Pet. App."), pp. 79a-142a. In that case, the Kansas Supreme Court declared K.S.A. 21-4624(e) unconstitutional as written, under the Eighth and Fourteenth Amendments. Pet. App., pp. 87a-88a, 96a-115a. After an exhaustive analysis of the constitutional claim in light of this Court's caselaw relating to capital sentencing, the *Kleypas* court held:

> "We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional."

Pet. App., p. 115a. In reaching this conclusion, the *Kleypas* court carefully considered whether *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds in Ring v. Arizona*, 536 U.S. 584 (2002), resolved the constitutional claim with respect to the Kansas statute. The issue had been extensively briefed by both parties, as well as an *amicus*. The court engaged in a detailed examination of the plain language of the Kansas statute in contrast to the statute at issue in *Walton* (both as written and as analyzed by this

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[3] Mr. Marsh's motion to stay, and the Kansas Supreme Court's order granting the stay, are reproduced in the Appendix to this brief in opposition ("BIO App."), pp. 1-4.

Court), and found them substantively distinguishable:

> "The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before this court. Such a weighing equation results in mandating a death sentence where the jury finds equipoise as to the mitigating and aggravating circumstances."

Pet. App., pp. 102a-103a.

While the *Kleypas* court found the Kansas statute unconstitutional as written, the court held that the statute could be saved "by simply invalidating the weighing equation" and construing it to read, "[I]f the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances . . . exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstances found to exist, the defendant shall be sentenced to death[.]" Pet. App., p. 119a. The court then ordered the case remanded for a new penalty trial under the judicially reconstructed weighing equation. *Id.*[4]

A few months after the *Kleypas* decision, Mr. Marsh filed his appellate brief in the Kansas Supreme Court. In Issue 19 of the brief, Mr. Marsh argued that his

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[4] Mr. Kleypas' motion for rehearing on the judicial reconstruction issue was denied. The State of Kansas filed no request for rehearing, nor did it respond to Mr. Kleypas' motion. Kleypas' subsequent petition for *certiorari*, which argued that state law created a due process life and liberty interest in being resentenced to life imprisonment upon the lower court's finding the statutory equipoise formula unconstitutional, was also denied. See *Kleypas v. Kansas*, 537 U.S. 834 (2002). No response or cross-petition for *certiorari* was filed by the State of Kansas.

death sentence must be set aside pursuant to the *Kleypas* holding that the statutory equipoise formula was unconstitutional as written. Mr. Marsh argued that, at the very least, his death sentence had to be vacated and his case remanded for a new penalty trial in accordance with *Kleypas*. However, Mr. Marsh argued further that the disposition in *Kleypas* was contrary to the proper disposition specifically required by statutory law, which entitled him to be resentenced to life imprisonment because a provision of the state's death penalty law was held unconstitutional.[5] In addition, he argued that, under well-established rules of statutory construction and separation of powers doctrine, the *Kleypas* court was wrong in reconstructing the statutory weighing equation after declaring it unconstitutional, given the unambiguous language used in the statute and evidence that the legislature intentionally chose to use that language. Accordingly, Mr. Marsh argued, the portion of the *Kleypas* decision that saved the statute through judicial reconstruction should be overruled. BIO App., pp. 5-10.

In its brief on appeal filed nearly one year later, the State of Kansas abandoned its earlier argument that the Kansas statutory weighing equation was constitutional under *Walton v. Arizona*. Instead, the State specifically conceded that the weighing equation as written was unconstitutional:

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[5] See K.S.A. 21-4629, which provides: "In the event a sentence of death or any provision of this act authorizing such sentence is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law."

> "In *Kleypas, supra*, this Court found the application of the weighing equation in K.S.A. 21-4624(e) with respect to aggravating and mitigating factors to be unconstitutional when such application could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise. 40 P.3d at 232. Because Defendant's death sentence was imposed as a result of the same unconstitutional application of K.S.A. 21-4624(e) as occurred in *Kleypas*, the State concedes that his sentence must be set aside and his case remanded for resentencing in accordance with the *Kleypas* decision. 40 P.3d at 234."

BIO App., p. 13. The State of Kansas went on to argue that state law did not prohibit reimposition of the death penalty on remand, and that the *Kleypas* court's reconstruction of the statutory weighing equation to require that aggravating circumstances outweigh mitigating circumstances was within the court's lawful authority and did not violate separation of powers doctrine. BIO App., pp.13-17.

In its decision in Mr. Marsh's case, the Kansas Supreme Court explained that it had held in *Kleypas* that the statutory weighing equation was unconstitutional as written under the Eighth and Fourteenth Amendments, but "we avoided striking the statute down as unconstitutional on its face . . . by construing it to mean the opposite of what it said, *i.e.*, to require aggravating circumstances to outweigh mitigating circumstances." Pet. App., p. 18a. The Kansas Supreme Court then described the issue it was presented with in this case:

> "Here, Marsh correctly notes, and the State concedes, that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the

> further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled."

Pet. App., p. 19a.

The Kansas Supreme Court's majority opinion began by reciting the relevant portions of the *Kleypas* decision which "succinctly summarized" why the statutory weighing equation "as written did not comport with the Eighth and Fourteenth Amendments." Pet. App., pp. 19a-20a. "After full reconsideration," the majority rejected an invitation from two of the dissenters to "revisit" the constitutionality of the statute as written, stating that the court would "continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments." Pet. App., pp. 20a- 21a.

The Kansas Supreme Court went on to conclude in the present case that, in reconstructing the statutory weighing equation to mean the opposite of what it said, the *Kleypas* court had misapplied the constitutional avoidance doctrine, because that doctrine "is applied appropriately *only* when a statute is ambiguous, vague, or overbroad" and "[t]he court's function is to interpret legislation, not rewrite it." Pet. App., p. 24a (emphasis in original). The error in *Kleypas*, the court found, was that the *Kleypas* majority had failed to apply the fundamental rule of statutory construction set forth in its own precedent, *i.e.*, that "'when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so

as to add something not readily found in the statute,'"[6] before moving to the canons that support the avoidance doctrine. Pet. App., p. 24a. The court observed that one of the dissenters in *Kleypas* had stressed the very point in arguing that, by adopting language "exactly the opposite of what the legislature stated," the *Kleypas* majority had invaded the province of the legislature. Pet. App., p. 25a (*Marsh* decision); Pet. App., pp. 120a-121a (*Kleypas* decision)(Davis, J., dissenting). The court agreed with that reasoning, and concluded below that "[t]he appropriate, limited judicial response to the problem identified for the first time in *Kleypas* was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper." Pet. App., p. 26a. That conclusion, the court held, required it "to overrule that portion of *Kleypas* upholding the statute through application of the avoidance doctrine." Pet. App., p. 28a. It further held that principles of *stare decisis* did not prevent it from doing so in the situation presented, where the *Kleypas* court's application of the avoidance doctrine was not "fully vetted" and its rewriting of the statute "was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature." Pet. App., pp. 28a-31a.

Following the Kansas Supreme Court's decision in Mr. Marsh's case, the State of Kansas filed a motion for rehearing. The sole argument in the motion was that K.S.A. 21-4624(e) could be "saved" by severing the unconstitutional "equipoise"

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[6] See Pet. App., pp. 21a-22a, quoting *State ex rel. Graeber v. Marion County Landfill*, 276 Kan. 328, 339, 76 P.3d 1000, 1008 (2003).

provision from the remainder of the statute. By striking "three words and a suffix," the State argued, the statute would read to require that aggravating circumstances outweigh mitigating circumstances before a death sentence can be imposed. BIO App., pp. 18-27. Mr. Marsh replied that the severance doctrine did not apply: - that the State's argument called for the same rewriting of the plain and unambiguous statutory language that had required the court to overrule the part of *Kleypas* purporting to save the statute through judicial reconstruction. BIO App., pp. 28-30. The Kansas Supreme Court denied the State's motion. Pet. App., p. 78a.

## REASONS WHY THE WRIT SHOULD BE DENIED

Contrary to Rule 14(g)(i), the State's petition for *certiorari* contains no "specification of the stage in the proceedings . . . when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by . . . [the] courts [below]." This omission is not simply inadvertent. The federal question that the State asks this Court to review was neither raised in the Kansas Supreme Court nor passed upon by that court in Mr. Marsh's case. The Kansas Supreme Court's judgment below was not entered in proceedings "where . . . the validity of a [state] statute . . . [was] drawn in question *on the ground of its being repugnant to the Constitution* . . . of the United States" or "where any right . . . [was] *specially set up or claimed under the Constitution*," disputed by the parties, or adjudicated by the court. 28 U.S.C. § 1257(a) (emphasis added). This Court accordingly has no jurisdiction to review

that judgment.

In the separate and distinct appeal in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (Kan. 2001), *cert. denied* 537 U.S. 834 (2002), Gary Kleypas and the State of Kansas joined issue on the questions of the federal constitutionality of the equipoise instruction given to Mr. Kleypas's jury and of the Kansas statute requiring that instruction. The Kansas Supreme Court in *Kleypas* held the instruction unconstitutional but severed and upheld the remainder of the statute after excising the provision that contained the formula requiring the equipoise instruction. The present case between Michael Marsh and the State of Kansas then proceeded in the Kansas Supreme Court.

Mr. Marsh argued that under the federal constitutional ruling in *Kleypas* he was entitled at the least to a reversal of his death sentence and a new penalty trial. He went on to challenge the correctness of the severability decision in *Kleypas*, contending that the Kansas statute authorizing the death penalty had to be invalidated because of the flaw identified in *Kleypas* and that he could therefore not be subjected to a capital-sentencing retrial. Unlike Mr. Marsh, the State of Kansas in the present case did not contest any aspect of the earlier rulings in *Kleypas*. To the contrary, it explicitly accepted the *Kleypas* ruling invalidating the statutorily prescribed equipoise formula and conceded that Mr. Marsh was entitled to a reversal of his death sentence under that ruling.

As the Kansas Supreme Court described the positions of the parties, "the State concedes . . . that *Kleypas* requires us to vacate Marsh's death sentence and remand

for reconsideration of the death penalty under proper instructions"; "Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled." Pet. App., p. 19a. The State's response to this further argument was *not* that the statutory equipoise formula was federally constitutional but only that it was severable from the rest of the statute – a purely state-law contention.[7]

Upon the issue thus framed, the Kansas Supreme Court in Mr. Marsh's case overruled the portion of its *Kleypas* decision that had held the statute severable. This ruling was based upon "'a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.'"[8] Even in its petition for rehearing of the *Marsh* ruling, the State did not

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[7] See, *e.g.*, *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976) (when a portion of a state legislative enactment is invalidated on federal constitutional grounds, the question of the severability of the remainder of the enactment is "only a state-law question" and presents "no federal, much less constitutional, question"); *Dorchy v. Kansas*, 264 U.S. 286, 325 (1924) (Justice Brandeis for a unanimous Court) (whether a state statute that is federally unconstitutional in part is severable "is a question of interpretation and of legislative intent. . . . ¶ The task of determining the intention of the state legislature in this respect, like the usual function of interpreting a state statute, rests primarily upon the state court. Its decision as to the severability of a provision is conclusive upon this Court."), *followed by Bell v. Maryland*, 378 U.S. 226, 239-241 (1964).

[8] Pet. App., p. 21a, quoting *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 339, 76 P.3d 1000, 1008 (2003). See also Pet. App., p. 24a ("It is apparent to us that *Kleypas* failed to apply the fundamental rule of statutory construction as stated in *State ex rel. Graeber* before moving to application of the canons that support the avoidance doctrine. Indeed, the fundamental rule of statutory construction was not even noted in the [*Kleypas*] majority 's discussion and resolution of the equipoise issue."); Pet.

challenge the portion of the *Kleypas* decision that had held the equipoise formula federally unconstitutional.[9] Its submission for rehearing in *Marsh* continued to be only that the remainder of the statute should be severed from the federally unconstitutional

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App., p. 26a ("We agree with Justice Davis's reasoning and conclusion [in dissent in *Kleypas*] that the *Kleypas* majority erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature. The holding eviscerated the legislature's clear and unambiguous intent regarding equipoise and thus overstepped the judiciary's authority to interpret legislation rather than make it").

[9] In making this observation, we do not suggest that the State could have preserved a federal constitutional issue for this Court's review by raising it for the first time in a motion for rehearing in the Kansas Supreme Court. "The long-established general rule is that the attempt, to raise a federal question after judgment, upon a petition for rehearing, comes too late, unless the court actually entertains the question and decides it . . . [or unless] the question respecting the validity of the statute as applied by the lower court first arose from its unanticipated act in giving to the statute a new construction . . . [so that] the ruling of the state court could not have been anticipated and a petition for rehearing presented the first opportunity for raising it." *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935). See also, *e.g.*, *Fullerton v. Texas*, 196 U.S. 192, 193 (1905). The latter "exception to the rule," *Herndon*, 295 U.S. at 444, would not apply here, even if the State had undertaken to resuscitate the issue of the federal constitutionality of the equipoise provision after the Kansas Supreme Court in *Marsh* held the rest of the statute inseverable from that provision. The basis for the court's inseverability holding was Marsh's explicit contention, after *Kleypas*, that the severability aspect of the *Kleypas* decision was wrong and should be overruled. The State took issue with that contention – obviously perceiving that the Kansas Supreme Court would consider it and might find it persuasive – but the State's rejoinder to the contention was solely that the equipoise-instruction provision was severable, not that it was constitutional. The State not only could have anticipated the Kansas Supreme Court's decision of which it now complains; the State *did* anticipate that decision. And, anticipating it, the State deliberately chose not to argue against such a decision on federal constitutional grounds but only on state statutory grounds. But while this choice would doubtless have precluded it from interjecting the federal issue of the constitutionality of the equipoise formula into the case belatedly on its motion for rehearing even if it had attempted to do that, the motion for rehearing itself *also* explicitly withdrew the issue from the State's submission and from the Kansas Supreme Court's consideration. See note 10 *infra*.

provision embodying the equipoise formula.[10]

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[10] The State 's Motion for Rehearing is reproduced at BIO App., pp. 18-27. It begins by saying that the motion for rehearing is filed "in order to address the applicability of the severability provisions of K.S.A. 21-4630 to K.S.A. 21-4624 (the death penalty statute), and whether the application of K.S.A. 21-4630 will allow the unconstitutional 'equipoise' instruction to be severed and the remaining constitutional provisions of the death penalty statute to be given effect." BIO App., p. 18. A footnote in the motion for rehearing recites:

> "The State still holds the position that the statute as written is constitutional, but for the sake of this Motion for Rehearing, the State accepts this Court's interpretation to the contrary. The State did not argue for the constitutionality of the statute as written in its brief because at the time *State v. Kleypas* . . . was controlling law, and had been resolved contrary to the State's position. The State did not believe it was appropriate to raise an argument before this Court which it had already been [sic] squarely considered and decided only a matter of months earlier, with no intervening change in law. However, this should not be viewed as a concession of the issue. The State could not reasonably foresee that this Court would overrule *Kleypas*. Should this Motion for Rehearing be denied, or should the Court uphold its present ruling upon rehearing, the State still intends to seek review in the United States Supreme Court, challenging this Court's determination that the weighing equation in K.S.A. 21-4624 violates the United States Constitution."

BIO App., pp. 19-20, n. 1. Thus, while admitting that the State had not previously defended the Kansas death-penalty statute on the ground that the statutory equipoise formula was federally constitutional, the State's motion for rehearing simultaneously (1) explained this failure by asserting that the "State could not reasonably foresee that this Court would overrule *Kleypas*" – a factually erroneous proposition but one which, if true, would have enabled it to preserve its federal defense by urging the Kansas Supreme Court to uphold the federal constitutionality of the equipoise instruction upon rehearing, see note 9 *supra*; *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-678 (1930) – and (2) *still* declined to submit the federal issue for consideration and decision by the Kansas Supreme Court below.

Under these circumstances, the State cannot be heard in this Court to argue that the federal constitutional holding of *Kleypas* invalidating the equipoise instruction and its statutory authorizing provision was wrong. The State did not raise that issue in the Kansas Supreme Court in Mr. Marsh's case. It and the Kansas Supreme Court both treated Mr. Marsh's case as raising solely the state-law issue whether the rest of Kansas's death-penalty statute was severable from the provision that *Kleypas* had invalidated. Having limited the scope of the controversy below to the single issue of severability, the State cannot now claim that it put the validity or invalidity of the Kansas death-penalty statute into question in the Kansas Supreme Court "on the ground of its being repugnant to the Constitution," as was required in order bring the case within this Court's jurisdiction under 28 U.S.C. § 1257(a).

*Illinois v. Gates*, 462 U.S. 213 (1986), is controlling on this point. In *Gates*, state criminal defendants (a husband and wife) raised a federal constitutional claim (that a search warrant for their car and residence had been issued without probable cause, in violation of the Fourth Amendment) as the basis for a motion to suppress evidence. The state trial court granted the motion; an intermediate state appellate court affirmed; and in the Illinois Supreme Court the State opposed the defendants' federal constitutional claim on a single ground (that there *was* probable cause for the issuance of the warrant). The Illinois Supreme Court rejected that ground of defense against the federal claim and entered judgment for the defendants on the claim (holding, specifically, that the evidence

had to be suppressed as the fruit of a search conducted under a warrant issued in violation of the Fourth Amendment to the Constitution of the United States). On the State's petition for *certiorari*, this Court refused to hear a *different* ground of defense offered by the State against the Gates defendants' federal constitutional claim (the defense that the Fourth Amendment exclusionary rule does not require the suppression of evidence seized under a search warrant issued without probable cause). Chief Justice Rehnquist explained:

> "It is clear in this case that respondents expressly raised, at every level of the Illinois judicial system, the claim that the Fourth Amendment had been violated by the actions of the Illinois police and that the evidence seized by the officers should be excluded from their trial. It also is clear that the State challenged, at every level of the Illinois court system, respondents' claim that the substantive requirements of the Fourth Amendment had been violated. The State never, however, raised or addressed the question whether the federal exclusionary rule should be modified in any respect, and none of the opinions of the Illinois courts give any indication that the question was considered.
>
> "The case, of course, is before us on the State' s petition for a writ of certiorari. Since the Act of December 23, 1914, c. 2, 38 Stat. 790, jurisdiction has been vested in this Court to review state court decisions even when a claimed federal right has been upheld. Our prior decisions interpreting the 'not pressed or passed on below' rule have not, however, involved a State's failure to raise a defense to a federal right or remedy asserted below. As explained below, however, we can see no reason to treat the State's failure to have challenged an asserted federal claim differently from the failure of the proponent of a federal claim to have raised that claim."

462 U.S. at 220-221.

In short, when the opponent of a federal constitutional claim defends against it on a ground that fails to put a particular constitutional issue into controversy in the state courts, s/he can no more raise the issue for the first time in this Court than the proponent of a federal constitutional claim can raise the claim for the first time in this Court.

The force of that rule is substantially stronger in the present case than in *Gates*. Chief Justice Rehnquist's *Gates* opinion observed that, although the Court had "held early on that . . . [the predecessor of 28 U.S.C. § 1257] furnished us with no jurisdiction unless a federal question had been both raised and decided in the state courts below" (*Gates*, 462 U.S. at 218), "several of our more recent cases have treated the so-called 'not pressed or passed upon below' rule as merely a prudential restriction" rather than as a jurisdictional limitation (*Gates*, 462 U.S. at 219). And the *Gates* opinion did not undertake to resolve the "inconsistent views [in the cases it discussed] as to whether this rule is jurisdictional or prudential in cases arising from state courts." *Yee v. City of Escondido*, 503 U.S. 519, 533 (1992); see *Howell v. Mississippi*, 125 S. Ct. 856, 860 (2004). But both in *Gates* and in the cases that *Gates* cited for the "prudential" view,[11] there was *another* federal constitutional issue in the case, distinct from the issue that gave rise to the discussion of the "not pressed or passed upon below " rule; and this *other* issue

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[11] *Terminiello v. Chicago*, 337 U.S. 1 (1949); *Vachon v. New Hampshire*, 414 U.S. 478 (1974).

plainly sufficed to support the Court's jurisdiction because it had been duly preserved by proceedings in the state courts through which "the validity of a statute . . . [had been] drawn in question on the ground of its being repugnant to the Constitution . . . [or through which a] right . . . [had been] specially set up or claimed under the Constitution," within 28 U.S.C. § 1257(a).[12] In that situation, the question whether, instead of addressing the duly-preserved issue, the Court could properly decide the case on a different federal issue – one not duly preserved because "not pressed or passed upon below " – may well be prudential rather than jurisdictional. But where, as in the present case, the *only* federal issue raised in a petition for *certiorari* was "not pressed or passed upon below," it is difficult to see how the terms of § 1257(a) permit any other conclusion than that this Court lacks jurisdiction of the case.

In any event, the 'not pressed or passed upon below' rule, whether conceived as jurisdictional or prudential, has consistently been applied by this Court to forbid a party who has raised only contention *X* in the state courts to switch position and raise contention *Y* here, even when both contentions are federal. See, *e.g.*, *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-435 (1940) (this Court will not hear claims "which suitors have failed to urge before . . . [the state's highest court], or which, in the course of proceedings there, have been abandoned," *id.* at 435).

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[12] In *Gates*, for example, the State of Illinois had duly preserved the issue whether probable cause was shown for the issuance of the search warrant challenged by the Gates defendants. Indeed, Illinois won the *Gates* case in this Court on precisely that issue.

> "In *Dewey v. Des Moines*, 173 U.S. 193 [(1899)], it was held that where a Federal question is raised in the state courts, the party who resorts to this court cannot raise another Federal question, not connected with it, which was not raised in any of the courts below.
>
> "To justify our taking jurisdiction, the Federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the Constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. *Oxley Stave Company v. Butler County*, 166 U.S. 648 [(1897)]. 'In other words, the court must be able to see clearly from the whole record that a provision of the Constitution or act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. . . .'"

*Keokuk and Hamilton Bridge Company v. Illinois*, 175 U.S. 626, 633-634 (1900), quoting *Dewey*, 173 U.S. at 198. *A fortiori*, when a party has argued only state-law issues in the state courts, s/he may not switch position and present a federal issue here. That has always been the rule of this Court. *E.g.*, *Levy v. Superior Court*, 167 U.S. 175, 177-178 (1897); *Howell v. Mississippi*, *supra* (this Term). And more than a century ago the Court applied the rule in a case remarkably similar to Mr. Marsh's. In *Morrison v. Watson*, 154 U.S. 111, 115 (1894), the North Carolina Supreme Court, having heard and rejected a claim of federal unconstitutionality of a state statute in an earlier case, applied the statute in Morrison's case with the explanation that it had been relevantly construed and upheld against constitutional challenge in the earlier case. This Court held explicitly that the reiteration failed to give the Court jurisdiction to review the previously adjudicated

federal issue, in the absence of a renewed controversy between the parties on the specific point.[13] "Under these circumstances," Justice Gray wrote for the Court, "the fact that in .

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[13] *Morrison* so held even though, at that time, it was this Court's practice to entertain constitutional challenges to state statutes framed in less precise terms than other federal questions, distinguishing between the specificity required in order that the validity of a state statute be "drawn in question" and the specificity required in order that a title, right, privilege or immunity be "specially set up or claimed," within the meaning of the then-extant predecessor of present 28 U.S.C. § 1257. (See, *e.g.*, *Harding v. Illinois*, 196 U.S. 78, 85-86 (1904).) "[T]his distinction does not seem to have survived and has no persisting effect in distinguishing between the different grounds for certiorari jurisdiction in the present statute." 16B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE, Jurisdiction.2d § 4022 (1996). Indeed, since at least the 1940's the Court has consistently rejected the notion that an issue regarding the constitutionality of a state statute can be pleaded less specifically than other federal issues for the purpose of its jurisdiction under § 1257. See, *e.g.*, *Charleston Federal Savings & Loan Ass'n v. Alderson*, 324 U.S. 182, 185 (1945) ("[i]t is essential to our jurisdiction on appeal under §237(a) that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws"), *followed by Raley v. Ohio*, 360 U.S. 423, 435 (1959) (Court dismisses appeal for lack of jurisdiction but considers merits on *certiorari* because various rights, privileges and immunities under the Constitution were claimed); *Rohr Aircraft Corporation v. County of San Diego*, 362 U.S. 628, 629-630 (1960) (same); *Slagle v. Ohio*, 366 U.S. 259, 264 (1961) (same); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 562 n. 4 (1980) (same: "[a]ppellants never explicitly challenged the statute's validity"). *Compare Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 473 n. 4 (1989) (Court finds jurisdiction because "appellant explicitly drew in question the validity of . . . [a state statute] on federal grounds."); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 544 n. 3 (1987) (Court finds jurisdiction because "[a]ppellants squarely challenged the constitutionality of . . . [a state statute], as applied, and the Court of Appeal sustained the validity of the statute as applied."); *R.J. Reynolds Tobacco Company v. Durham County*, 479 U.S. 130, 136 (1986) (Court finds jurisdiction because "Reynolds explicitly drew the ad valorem property tax, as applied to its imported tobacco, into constitutional question, and the North Carolina courts upheld the validity of the tax."); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 440-441 (1979) (Court finds jurisdiction because "appellants squarely challenged the constitutionality of the tax statute, as applied, and the California Supreme Court just as squarely sustained its validity, as applied."); *Coates v. City of Cincinnati*, 402 U.S. 611, 612 (1971) (Court

. . [the North Carolina Supreme Court's *Morrison*] opinion the construction and validity of the statute were treated as settled by the ruling in the earlier case . . . and were restated by way of explanation of the defense at the trial of the present case, fall short of showing that there was any real contest at any stage of this case upon the point."[14]

Here, too, there was no "real contest" in the Kansas Supreme Court in "this case upon the point " that the State seeks to have this Court decide on *certiorari*. The State describes that point – the Question Presented by its petition – as being:

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recites that it noted probable jurisdiction of an appeal where "throughout this litigation it has been appellant's position that the ordinance on its face violates the First and Fourteenth Amendments of the Constitution.").

[14] As in *Morrison*, the Kansas Supreme Court here reiterated its *Kleypas* holding. See Pet. App., pp. 19a-21a. But, as in *Morrison*, this kind of reiteration of an earlier holding, in the absence of any contention by a party that the earlier holding should be reconsidered, does not "show[ ] that there was any real contest at any stage of this case upon the point" See *Black v. Cutter Laboratories*, 351 U.S. 292, 297-298 (1956):

> "This Court . . .reviews judgments, not statements in opinions. . . . At times, the atmosphere in which an opinion is written may become so surcharged that unnecessarily broad statements are made. In such a case, it is our duty to look beyond the broad sweep of the language and determine for ourselves precisely the ground on which the judgment rests. This means no more than that we should not pass on federal questions discussed in the opinion where it appears that the judgment rests on adequate state grounds."

And once the State conceded that the *Kleypas* holding invalidating the statutory equipoise formula should be accepted as the rule of decision and the starting point for severability analysis in Mr. Marsh's appeal, "it follows as a necessary consequence, that the question submitted to the court and decided by them was one of construction, and not of validity." *Commercial Bank of Cincinnati v. Buckingham's Executors*, 46 U.S. 317, 342 (1847).

> "Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?"

(Petition for Certiorari, p. 1.) The Supreme Court of Kansas decided *that* question in the case of *State of Kansas v. Gary W. Kleypas*, not in the present case.[15] The State could have put the point in controversy once again in the present case by contending in its subsequent briefing and argument to the Kansas Supreme Court in Michael Marsh's appeal that *Kleypas* had been wrongly decided. Had it done so, Michael Marsh's appeal – the case now at bar – would have been one "where the validity of a statute of . . . [a] State is drawn in question on the ground of its being repugnant to the Constitution of the United States," within this Court's jurisdictional charter, 28 U.S.C. § 1257(a). But the State of Kansas did not do so. Mr. Marsh alone took issue with any part of the *Kleypas*

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[15] It is instructive to compare the *syllabi* written by the court to specify exactly what it was holding in each of the two cases. The only paragraph in the *Marsh* syllabus dealing with the constitutionality of the Kansas death-penalty statute is the paragraph numbered 25 at Pet. App., p. 5a. It contains three sentences explaining why the statute as a whole is non-severable, followed by a final sentence saying that "As a result," the statute is facially unconstitutional under the Eighth and Fourteenth Amendments. Paragraph 25 is one of a suite of paragraphs – from paragraph 18 at Pet. App., p. 3a through paragraph 26 at Pet. App., p. 6a – *all* of which have *only* to do with severability analysis and related principles of statutory construction. The issue that the State seeks to present to this Court in its petition for *certiorari* – whether the equipoise provision itself offends the federal Constitution – is nowhere mentioned in the *Marsh* syllabus because it was not decided on the *Marsh* appeal. In stark contrast, the *Kleypas* syllabus enunciates federal Eighth Amendment principles in paragraphs 43-44 at Pet. App., p. 87a and reasons from them (in paragraph 45 at Pet. App., pp. 87a-88a) that K.S.A. 21-4624(e), the equipoise provision "denies what the Eighth Amendment requires." This is the precise Question Presented at page i of the State's Petition for Certiorari.

decision; and the issue that Mr. Marsh took with *Kleypas* concerned its severability holding alone.

Advised that Mr. Marsh was asking the Supreme Court of Kansas to reconsider this aspect of *Kleypas* and to hold the Kansas death-penalty statute nonseverable, the State took issue with Mr. Marsh's submission solely on the state-law ground of severability *vel non*. And even after the Kansas Supreme Court in Mr. Marsh's case held the statute nonseverable – a holding that plainly cannot confer jurisdiction on this Court, see *New York v. Uplinger*, 467 U.S. 246, 249 n. 2 (1984), and note 7 *supra* – the State's motion for rehearing *still* declined to present any federal constitutional controversy for decision by the Kansas courts.

Title 28 U.S.C. § 1257(a) describes the jurisdictional bases that must exist before a state-court judgment "may be reviewed" by this Court. The Court cannot "review " the question of the "validity" of Kansas's statutory equipoise formula "on the ground of its being repugnant to the Constitution " (§ 1257(a)) because that question was "not pressed or passed upon below" but was conceded by the State in the Kansas Supreme Court to have been resolved in the earlier *Kleypas* case.[16] And it cannot review the

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[16] "It has long been settled that this Court acquires no jurisdiction to review the judgment of a state court of last resort on writ of error, unless it affirmatively appears upon the face of the record that a federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court. . . . It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a federal nature." *Mellon v. O'Neil*, 275 U.S. 212, 214-215 (1927).

severability issue on which the validity of the statute *was* called into question in the Kansas Supreme Court because that question is "no[t] federal, much less constitutional." *City of New Orleans v. Dukes*, 427 U.S. at 302, cited and quoted in note 7 *supra*.

## CONCLUSION

*Certiorari* should be denied because the Court has no jurisdiction in the premises.

Respectfully submitted,

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# APPENDIX

Supreme Court, U.S.
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(3)

No. 04-1170

IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

v.

MICHAEL LEE MARSH, II,

*Respondent.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas**

## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

In the case at bar, the Kansas Supreme Court clearly and expressly declared that Kansas' death penalty statute is, on its face, repugnant to the United States Constitution. In the Petition for a Writ of Certiorari, petitioner demonstrated that the decision of the lower court directly conflicts with the Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled sub nom. on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002), and created a conflict with the Ninth Circuit and Supreme Courts of Arizona and Idaho. The petition further demonstrated that the lower court's decision, striking down Kansas' capital sentencing system and calling into doubt the validity of other states' capital sentencing systems, is an important issue that merits the Court's consideration. Respondent does not attempt to deny any of this in his Brief in Opposition. Rather, he devotes his entire brief to the argument that the Court lacks jurisdiction because petitioner did not raise the federal constitutional issue before the lower court. That argument is fatally flawed. The lower court unquestionably passed on the question presented in the petition. Therefore, under 28 U.S.C. § 1257 and the Court's own precedent, jurisdiction to review that decision is satisfied.

1. Under 28 U.S.C. § 1257(a), "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution." In the present case, the Kansas Supreme Court expressly declared that Kansas' death penalty statute, Kan. Stat. Ann. § 21-4624(e), is repugnant to the United States Constitution. Pet. App. 5a Syl. ¶ 25; 21a. This case plainly meets the jurisdictional requirements of 28 U.S.C. § 1257.

The Kansas Supreme Court ruled on the constitutional issue—the question presented in the Petition for a Writ of

Certiorari—in two, mutually supporting, ways. First, the court stated in its syllabus that "the statute is unconstitutional on its face under the Eighth and Fourteenth Amendments." Pet. App. 5a Syl. ¶ 25. In Kansas, the syllabus of the court is considered a statement of the law of the case and part of the binding decision of the court. See Kan. Stat. Ann. § 20-111; Kan. Stat. Ann. § 60-2106(b).[1]

Second, the Kansas Supreme Court reiterated the same in the body of its decision. Under the heading, "CONSTITUTIONALITY OF K.S.A. 21-4624(e)," the court committed several pages to a discussion of the constitutionality of the statute. Pet. App. 17a-21a. The court noted that between respondent's sentencing and appeal, it had decided *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002), in which it determined that the *application* of the statutory weighing equation was unconstitutional. Pet. App. 18a. Quoting from *Kleypas*, the court reiterated why it believed the weighing equation was unconstitutional. *Id.* at 19a-20a. The court specifically addressed the application of *Walton*, *supra*, stating its view "that a majority of the United States Supreme Court has never squarely addressed or decided the facial constitutionality of the equipoise provision before us." *Id.* at 21a. The court concluded its analysis of the constitutionality of the statute by saying, "[a]fter *full reconsideration*, we reject reliance on Justice Blackmun's *Walton* dissent and continue to adhere to the *Kleypas* majority's reasoning and

[1] *See also, e.g., State v. Sims*, 862 P.2d 359, 364 (Kan. 1993) (discussing proper application of a particular syllabus paragraph as precedent); *Umbehr v. Bd. of Wabaunsee County Comm'rs*, 843 P.2d 176, 181 (Kan. 1992) (discussing generally the nature of syllabus paragraphs and their subsequent application in later cases); *In re Estate of Anderson*, 865 P.2d 1037, 1042 (Kan. Ct. App. 1993) ("We base our decision on a point of law stated in the Supreme Court's syllabus in *Burcham*."); *In re Lett*, 640 P.2d 1294, 1300 (Kan. Ct. App. 1982) (Abbott, P.J., concurring) ("Although it has been argued by some members of this court that the holding in question is dicta, the disputed language is contained in the law of the case at syllabus P 2.").



holding that K.S.A. 21-4624(e) *as written* is unconstitutional under the Eighth and Fourteenth Amendments." *Id.* at 21a (emphasis added). There can be no doubt that the Kansas Supreme Court believed that the constitutional issue now raised was before it and that it announced a holding on that issue.

2. The crux of respondent's argument in opposition is that the constitutional issue now raised by petitioner was not presented to the lower court. However, even if that were true, it would not deprive the Court of jurisdiction. The Court stated in *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam), that "we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was *either* addressed by, *or* properly presented to, the state court that rendered the decision we have been asked to review." (emphasis added). Thus, even if the issue was not properly presented before the lower court, the fact that the lower court addressed the constitutional issue and rendered a decision based on the Constitution is sufficient to confer jurisdiction on the Court to review the matter.

Indeed, it is well settled in a long line of decisions of the Court that "[a] ruling on the merits of a federal question by the highest state court leaves the federal question open to review." *Franks v. Delaware*, 438 U.S. 154, 161 (1978). As far back as 1914, the Court recognized its authority to review federal questions decided by state courts, even though a particular federal question "had not been expressly asserted below." *Manhattan Life Ins. Co. v. Cohen*, 234 U.S. 123, 134 (1914). The Court observed that, "it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided." *Id.* This was reiterated in *Raley v. Ohio*, 360 U.S. 423, 436 (1959) ("There can be no question as to the proper presentation of a federal claim when the highest state court passes on it."); *Orr v. Orr*, 440 U.S. 268, 274-75 (1979) (quoting *Manhattan Life*, *supra*); and *Payton v. New*

*York*, 445 U.S. 573, 582 n.19 (1980) ("Although it is not clear from the record that appellants raised this constitutional issue in the trial courts, since the highest court of the State passed on it, there is no doubt that it is properly presented for review by this Court."). The Court has jurisdiction to review the Kansas Supreme Court's holding that the Kansas death penalty statute violates the Eighth and Fourteenth Amendments.

3. In all events, and contrary to respondent's assertion, the constitutionality of Kan. Stat. Ann. § 21-4624(e) was raised in the lower court—by respondent. *See* Pet. App. 19a ("Marsh makes the further argument, however, that K.S.A. 21-4624(e) is unconstitutional on its face . . ."). Before the Kansas Supreme Court, respondent argued that the statute was unconstitutional on its face, and petitioner argued that it was not.

The litigation strategy of the parties can only be understood by recognizing the role of *State v. Kleypas* in the decision below. The *Kleypas* court addressed the very arguments presented here and rejected petitioner's contention that the weighing equation in Kan. Stat. Ann. § 21-4624(e) was constitutional under *Walton v. Arizona*, *supra*. Pet. App. 96a–119a. Instead of holding that the statute was unconstitutional on its face, however, the court held that the statute should be construed to provide that the death penalty can be imposed only when the aggravating circumstances outweigh the mitigating circumstances. The Court ruled that, "[s]o construed, we hold that K.S.A. 21-4624 does not violate the Eighth Amendment prohibition against cruel and unusual punishment." Pet. App. 119a. Accordingly, petitioner could not seek the Court's review of the lower court's conclusion in *Kleypas* given that the statute was ultimately construed to be constitutional.

By the time the instant case came before the Kansas Supreme Court, there was no federal constitutional issue for petitioner to raise. The statute, as definitively construed in



*Kleypas*, did not suffer from the purported constitutional problem of requiring that death be imposed if the aggravating and mitigating evidence are in equipoise. Petitioner can hardly be faulted for not asserting the federal constitutional issue which became relevant only after the Kansas Supreme Court overruled its earlier construction of the statute.

Respondent's principal contention in this case was that the statute was unconstitutional on its face under the Eighth and Fourteenth Amendments, and that by construing the statute to be constitutional in *Kleypas*, the court violated the separation of powers doctrine and the guarantee of a republican form of government set forth in Article IV, section 4, of the United States Constitution. BIO App. 8-10. In response, because *Kleypas* was binding precedent, petitioner was forced to take the position that, while it desired a different outcome in *Kleypas*, the issue had been decided and *Kleypas* was now the law. Accordingly, petitioner did not reiterate the very same arguments that the lower court had rejected in *Kleypas*, but rather maintained that the statute was constitutional as determined in *Kleypas*.

Petitioner could not reasonably foresee that the lower court would reopen the constitutional issue it had so recently decided. As the Chief Justice of the Kansas Supreme Court noted in her dissent in the present case, "the *Kleypas* court unanimously upheld the constitutionality of K.S.A. 21-4624(e)." Pet. App. 69a, and, "[o]ur decision in *Kleypas* is a mere 3 years old, and nothing this court has said in the interim has evidenced our intention to abandon its underlying principles." *Id.* at 74a. Further, she noted, "there has been nothing in the jurisprudence of the United States Supreme Court during that time to show that our decision in *Kleypas* was incorrect." *Id.* at 74a-75a. Under the circumstances, petitioner could not reasonably foresee that the lower court would exhume and rely upon the same arguments it considered in *Kleypas*. However, the court

below did, and in doing so, squarely passed upon the federal constitutional question presented here.

4. In any event, none of the described history affects the Court's jurisdiction as the lower court unquestionably held that the statute at hand was repugnant to the Constitution of the United States. Jurisdiction has clearly been satisfied and review by the Court is therefore warranted.

## CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILL KLINE
*Attorney General of Kansas*
NOLA TEDESCO FOULSTON
*District Attorney*
*18th Judicial District of Kansas*
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April 2005

Supreme Court, U.S.
FILED
JUL 15 2005
OFFICE OF THE CLERK

No. 04-1170

IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

v.

MICHAEL LEE MARSH, II,

*Respondent.*

**On Writ of Certiorari**
**to the Supreme Court of the State of Kansas**

## JOINT APPENDIX

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Petition for Certiorari Filed March 2, 2005
Certiorari Granted May 31, 2005

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## RELEVANT DOCKET ENTRIES

1. BEFORE THE CRIMINAL DEPARTMENT IN THE EIGHTEENTH JUDICIAL DISTRICT, SEDGWICK COUNTY, KANSAS, CASE NO. 96 CR 1157

| | | |
|---|---|---|
| 1. | 6/24/96 | Complaint/Information. |
| 2. | 6/24/96 | Notice of Intent to Request Separate Sentencing Proceeding with attached Exhibit (State's A-Complaint/Information). |
| 3. | 5/28/97 | Motion to Strike Death Penalty Sentence for Unconstitutional Weighing of Aggravators and Mitigation. |
| 4. | 7/24/97 | Response to Defendant's Motion to Strike Death Penalty for Unconstitutional Weighing of Aggravating and Mitigating Factors with attached article by Kansas University Law Professor Stephen McAllister titled Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capital Cases. |
| 5. | 7/24/97 | Amended Response to Defendant's Motion to Strike Death Penalty for Unconstitutional Weighing of Aggravating and Mitigating Factors. |
| 6. | 8/26/97 | Supplemental Memorandum in Support of Accused Filing No. 41 "Motion to Strike Death Penalty Sentence for Unconstitutional Weighing of Aggravation and Mitigation." |
| 7. | 7/2/98 | Transcript of Pretrial Hearing, November 7, 1997 Proceeding. |

| | | |
|---|---|---|
| 8. | 8/4/98 | Transcript of Jury Trial, December 8, 1997 Proceedings. |
| 9. | 8/4/98 | Transcript of Jury Trial, December 9, 1997 Proceedings. |
| 10. | 8/4/98 | Transcript of Jury Trial, December 10, 1997 Proceedings. |
| 11. | 8/4/98 | Transcript of Jury Trial, December 11, 1997 Proceedings. |
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| 13. | 8/4/98 | Transcript of Jury Trial, December 15, 1997 Proceedings. |
| 14. | 8/4/98 | Transcript of Jury Trial, December 16, 1997 Proceedings. |
| 15. | 8/4/98 | Transcript of Jury Trial, December 17, 1997 Proceedings. |
| 16. | 8/4/98 | Transcript of Jury Trial, December 18, 1997 Proceedings. |
| 17. | 8/4/98 | Transcript of Jury Trial, December 23, 1997 Proceedings. |
| 18. | 8/4/98 | Transcript of Jury Trial, December 29, 1997 Proceedings. |
| 19. | 8/4/98 | Transcript of Jury Trial, December 30, 1997 Proceedings. |
| 20. | 12/30/97 | Verdicts. |
| 21. | 8/4/98 | Continuation of Trial Proceedings, January 5, 1998. |
| 22. | 8/5/98 | Transcript of Death Penalty Phase, January 6, 1998. |
| 23. | 8/5/98 | Transcript of Death Penalty Phase, January 7, 1998. |

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|---|---|---|
| 24. | 8/5/98 | Transcript of Death Penalty Phase, January 8, 1998. |
| 25. | 8/5/98 | Transcript of Death Penalty Phase, January 9, 1998. |
| 26. | 1/15/98 | Instructions Given by Judge Clark V. Owens, II. |
| 27. | 1/12/98 | Verdict. |
| 28. | 8/5/98 | Transcript of Verdict, January 12, 1998. |
| 29. | 1/20/98 | Record of Trial or Plea. |
| 30. | 8/4/98 | Transcript of Sentencing, April 16, 1998. |

II. BEFORE THE SUPREME COURT OF THE STATE OF KANSAS, CASE NO. 98-81135-S

| | | |
|---|---|---|
| 1. | 5/7/98 | Docketing Statement/Death Penalty Case. |
| 2. | 5/7/98 | Notice of Appeal Filed by Michael Lee Marsh, II. |
| 3. | 5/7/98 | Order Appointing Counsel. |
| 4. | 3/29/01 | Motion to Stay Brief Due Date/or Extension of Time to File Brief – Marsh. |
| 5. | 4/12/01 | Memo Order Granting Motion to Stay in Part, Appellant's Brief Due 60 Days After Decision of *Kleypas* – Resp Noted. |
| 6. | 3/8/02 | Brief Received/Michael Lee Marsh, II. |
| 7. | 3/27/02 | Supplemental Brief/Michael Lee Marsh, II. |
| 8. | 1/7/03 | Brief Received/State. |
| 9. | 4/4/03 | Reply Brief/Michael Marsh. |
| 10. | 7/18/03 | Cause Scheduled for Hearing/Monday 09/08/03 1:30 PM. |
| 11. | 12/17/04 | Judgment Docketed-Opinion Filed/Affirmed Part, Reversed Part & Remanded w/Dirs. – Allegrucci, Luckert, Gernon & Beier, JJ. |
| 12. | 12/17/04 | Memo Motion/to Stay Mandate – State. |
| 13. | 12/20/04 | Memo Order – Granting Motion/To Stay the Mandate – State of Kansas. |
| 14. | 12/29/04 | Motion for Rehearing/Modification/State. |
| 15. | 1/6/05 | Response-/ to Motion for Rehearing – Marsh. |
| 16. | 2/2/05 | Motion for Rehearing or Modification-Denied/State of Kansas (Resp Noted). |
| 17. | 3/7/05 | Memo Notation/Petition for Writ of Certiorari Placed on 3/3/05 Docket. |

| | | |
|---|---|---|
| 18. | 6/6/05 | Memo Notation/Certiorari Granted, Parties to Brief & Argue Two Additional Questions. |

[Filed May 28, 1997]
Accused Filing No.41

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Plaintiff | ) | CASE NO. 96-CR-1157 |
| vs. | ) | |
| MICHAEL LEE MARSH, II<br>Defendant. | ) | |

**MOTION TO STRIKE DEATH PENALTY SENTENCE FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATORS AND MITIGATION**

COMES NOW Michael Marsh and moves this Court to strike as unconstitutional the death penalty sentencing scheme set out in K.S.A. 21-4624. The statute provides that, if the sentencer finds at least one aggravator and some mitigation, that a death sentence is mandatory if the aggravation is not outweighed by the mitigation. Thus, if the mitigation weighs less than the aggravation *or* the aggravation and mitigation are in equipoise, then death is mandatory. This procedural scheme, rather than one which requires the aggravation to outweigh the mitigation before death can even by considered, violates the state and federal constitution. It threatens arbitrary results that are virtually unreviewable by the appellate courts, as statutorily required. It compromises the individualized consideration demanded in a death penalty case. This reverse weighing is unconstitutional.

A written brief and/or oral argument will be presented in support of this request. Mr. March requests a hearing be granted on this motion.

Authority:

U.S. Const. Amends. V, VI, VIII and XIV
Kansas Const. B. of R. Sec. 9 and 18
People v. Young, 814 P.2d 834 (Colo. 1991)
State v. Weigel, 228 Kan. 194 (1980)
K.S.A. 21-4624, 4625, 4626, and 4627

Respectfully submitted,

/s/ Ronald E. Wurtz
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Supreme Court No. 7688

Attorney for the Accused

[Dated July 24, 1997]

James E. Puntch, Jr. #09108
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Wichita, Kansas 67203
316-383-7230

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Plaintiff | ) | CASE NO. 96 CR 1157 |
| vs. | ) | DIVISION NO. 20 |
| MICHAEL LEE MARSH, II<br>Defendant. | ) | |

**RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATING AND MITIGATING FACTORS**

COMES NOW the State of Kansas, by and through James E. Puntch, Jr., Assistant District Attorney, and makes the following response to Defendant's motion:

1. Defendant claims that the Kansas law for weighing aggravating and mitigating factors is unconstitutional. This claim is wrong. It is because the aggravating and mitigating factors are to be weighed that the law is constitutional.

2. The Kansas law requires that the sentencing jury weigh any aggravating factors found to exist beyond a reasonable doubt against any mitigating factors found to exist. The

essential claim of the defendant is that it is unconstitutional to require him to carry the burden of proving by a preponderance of the evidence that mitigating factors exist. Specifically he claims that it is unconstitutional that ties "equipose" do to the state. Although the defendant claims that this is unconstitutional he cites to U.S. Supreme Court cases on this point. He cites one Colorado case and one Kansas case. Neither are apposite.

3. The question of whether such a sentencing plan violates the Unite States Constitution was decided against the defendant years ago, although that fact is not noted in his brief. Walton v. Arizona, 497 U.S. 639, 111 L.Ed. 2d 511, 100 S.Ct.3047 (1990). In relevant part that decision states:

> "So long as a State's method of allocating the burdens does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."

Walton, *supra*, @ p.650.

As for the claim that in some situations death is mandatory, that is not the case. Walton, *supra*, reviewed that notion and concluded that so long as the jury is not precluded from considering ant type of mitigating evidence and does not automatically impose death upon conviction for certain types of murder, it is not impermissibly mandatory. Walton @ pps. 651 & 652.

4. The Kansas case cited by defendant has nothing to do with weighing aggravating and mitigating factors nor does it deal with the death penalty.

5. The Colorado case cited is based solely upon the Colorado State Constitution. In addition, the Colorado law differed from the Kansas law, particularly in the matter of aggravating circumstances.

6. The question of the constitutionality of the Kansas death penalty law, including this issue, was extensively reviewed in by Kansas University law professor Stephen McAllister in his article *Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capitol Cases*, Journal of the Kansas Bar Association, October 1995. A copy of that article is attached to this response. Professor McAllister notes that the Kansas system for weighing is constitutional. The defendant's motion should be denied.

/s/ James E. Puntch
James E. Puntch, Jr.
Assistant District Attorney

[Filed July 24, 1997]

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Wichita, Kansas 67203
316-383-7230

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Plaintiff | ) | CASE NO. 96 CR 1157 |
| vs. | ) | DIVISION NO. 20 |
| MICHAEL LEE MARSH, II<br>Defendant. | ) | |

**AMENDED RESPONSE TO DEFENDANT'S MOTION TO STRIKE DEATH PENALTY FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATING AND MITIGATING FACTORS**

COMES NOW the State of Kansas, by and through James E. Puntch, Jr., Assistant District Attorney, and makes the following response to Defendant's motion:

1. Defendant claims that the Kansas law for weighing aggravating and mitigating factors is unconstitutional. This claim is wrong. It is because the aggravating and mitigating factors are to be weighed that the law is constitutional.

2. The Kansas law requires that the sentencing jury weigh any aggravating factors found to exist beyond a reasonable

doubt against any mitigating factors found to exist. The essential claim of the defendant is that it is unconstitutional to require him to carry the burden of proving by a preponderance of the evidence that mitigating factors exist. Specifically he claims that it is unconstitutional that ties or "equipose" go to the state. Although the defendant claims that this is unconstitutional he cites to U.S. Supreme Court cases on this point. He cites one Colorado case and one Kansas case. Neither are apposite.

3. The question of whether such a sentencing plan violates the Unite States Constitution was decided against the defendant years ago, although that fact is not noted in his brief. Walton v. Arizona, 497 U.S. 639, 111 L.Ed. 2d 511, 100 S.Ct.3047 (1990). In relevant part that decision states:

> "So long as a State's method of allocating the burdens does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency."

Walton, *supra*, @ p.650.

As for the claim that in some situations death is mandatory, that is not the case. Walton, *supra*, reviewed that notion and concluded that so long as the jury is not precluded form considering ant type of mitigating evidence and does not automatically impose death upon conviction for certain types of murder, it is not impermissibly mandatory. Walton @ pps. 651 & 652.

4. The Kansas case cited by defendant has nothing to do with weighing aggravating and mitigating factors nor does it deal with the death penalty.

5. The Colorado case cited is based solely upon the Colorado State Constitution. In addition, the Colorado law

differed from the Kansas law, particularly in the matter of aggravating circumstances.

6. The question of the constitutionality of the Kansas death penalty law, including this issue, was extensively reviewed in by Kansas University law professor Stephen McAllister in his article *Federal Constitutional Requirements Governing Trial, Sentencing and Direct Review in Capitol Cases*, Journal of the Kansas Bar Association, October 1995. A copy of that article is attached to this response. Professor McAllister notes that the Kansas system for weighing is constitutional. The defendant's motion should be denied.

/s/ James E. Puntch
James E. Puntch, Jr.
Assistant District Attorney

[Served August 26, 1997]
Accused Filing No. 99

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Plaintiff | ) | |
| vs. | ) | CASE NO. 96-CR-1157 |
| MICHAEL LEE MARSH, II<br>Defendant. | ) | |

**SUPPLEMENTAL MEMORANDUM IN SUPPORT OF ACCUSED FILING NO. 41 "MOTION TO STRIKE DEATH PENALTY SENTENCE FOR UNCONSTITUTIONAL WEIGHING OF AGGRAVATION AND MITIGATION"**

Mr. Marsh filed his motion to strike the death penalty via Accused Filing No. 41 which was argued on August 12, 1997. Because there appeared to be some confusion regarding the grounds for this motion, Mr. Marsh submits the following in clarification and in further argument in order to convince the court of the righteousness of his request.

**The Kansas Weighing Scheme**

K.S.A. 21-4624 provides for a mandatory sentence of death where the aggravating circumstance(s) is (are) not outweighed by any mitigating circumstances.

Under the current Kansas scheme, one convicted of capital murder faces a subsequent penalty trial on the issue of whether the death penalty shall be imposed. At least one statutory list of aggravating circumstances must be found by

the jury. The accused may present evidence of mitigating circumstances, either statutory or non-statutory. The jury must designate, in writing, those aggravating circumstances it finds to exist, but the statute does not require the jury to disclose mitigating circumstances found. Assuming they jury follows the law, three results could occur if a verdict is reached:

(a) the aggravation could outweight the mitigation. The result is mandatory death.

(b) the aggravation and the mitigation could weigh equal. The result is mandatory death.

(c) the mitigation could outweigh the aggravation. The result is life.

Thus, of the three verdicts possible, only (c) provides the accused with an accounting of the weighing process. If death is imposed, the accused cannot know if aggravating circumstances outweighed mitigating circumstances or if the two were in balance. If either (a) or (b) above occur, the sentence *shall* be death without any further consideration by the jury. This point was especially troublesome for the Colorado Supreme Court in People v. Young, 814 P.2d 834 (1991).

**Argument and Authority**

K.S.A. 21-4624, in providing for a mandatory death sentence where aggravating circumstance(s) is (are) not outweighed by any mitigating circumstances, violates Section 9[1] and/or Section 18[2] of the Kansas Bill of Rights.

---

[1] All persons shall be bailable by sufficient sureties except for capital offenses, where proof is evident and the presumption great. Excessive bail shall not be required, no excessive fines imposed, nor cruel or unusual punishment inflicted.

[2] All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law and justice administered without delay.

As the request of this motion is to determine the constitutionality of our death penalty statute under our state constitution's Bill of Rights, the failure of ". . . the United States Supreme Court [to address] the constitutionality of a mandatory death penalty when the jury concludes that aggravating and mitigating factors are equally balanced . . ."[3] does not control the issue here. Logic would dictate, however, that in the absence of Federal persuasive guidance, the court should turn to the persuasive guidance of sister states. The Colorado statute held to be unconstitutional in Young is indistinguishable from the statute currently law in Kansas. And just as the Colorado Supreme Court looked to its own constitution to judge the legality of their statute, this Court his now asked to do likewise.

The Young court based its determination upon two provisions of the Colorado state constitution: Article 2, Section 20 ". . . nor cruel and unusual punishments inflicted," and Article 2, Section 25, "No person shall be deprived of life, liberty or property, without due process of law."

The Kansas counterpart to Colorado's Article 2, Section 20 is our Section 9 of the Bill of Rights.[4]

Our counterpart to Coloardo's Article 2, Section 25, is Section 18 of our Bill of Rights.[5]

---

[3] People v. Young, 814 P.2d 834, 845 (1991). Even the dissent of Justice Erickson in Young concedes that the U.S. Supreme Court has not ruled upon the Federal Constitutionality of a statute such as ours. Young, 814 P.2d at 860).

[4] Note that the Kansas section prohibits cruel or unusual punishments rather than cruel and unusual punishments. And the Kansas Supreme Court has distinguished between "cruel" and "unusual" [See *e.g.*, State v. Freeman, 223 Kan. 362 (1978) (analyzing factors for "cruel" punishment); State v. Gillmore, 88 Kan. 835 (1913) (analyzing a punishment as "unusual," without reference to cruelty)] In other cases, cruel/unusual are treated together as if joined by an "and", [See *e.g.*, State v. Strauch, 239 Kan. 203, 200 (1986).

It is clear from the Young opinion that Colorado's Supreme Court's decision invalidated their statute under both the Colorado "cruel and unusual punishment" clause and the state's due process clause independently of each other.

Research of our own "cruel OR unusual" punishment clause clearly reveals that this section of the Kansas constitution has been interpreted to provide broader protection to individuals than the United States Constitution's Eighth Amendment[6].

Section 18 of the Kansas Bill of Rights, the state Due Process Clause, is less well-defined by litigation. The Young court's analysis of Colorado's due process clause should serve as a blueprint for the Kansas interpretation of our own Due Process Clause.

---

[5] Our "due course of law" provision has evolved to the present understanding that Section 18 is a "due process" clause applicable to criminal cases. As far back as In re Petric, 1 Kan. App. 191 (1895), our first Court of Appeals suggested that Section 18 applies to criminal cases. In State v. Simms, 184 Kan. 587 (1959) and Ware v. Pinball Machines, 222 Kan. 416, 419 (1977), the Kansas Supreme Court specifically noted that Section 18 is the due process clause of our state constitution.

[6] In Harmelin v. Michigan, 501 U.S. ___, ___, 111 S.Ct. 2680, 2686, 115 L.Ed.2d 836, 846 (1991), the United States Supreme Court stated: "... the Eighth Amendment contains no proportionality guarantee." Kansas, however has long held that sentences should be evaluated for proportionality. *See*, State v. McCloud, 257 Kan. 1 (1995) (proportionality review); State v. Weigel, 228 Kan. 194 (1980) (criteria which are to be considered in determining what is cruel or unusual punishment as to the length of a sentence include excessiveness, disproportionality, lack of necessity, unacceptability to society, and arbitrariness of infliction); State v. McDaniel and Owens, 228 Kan. 172 (1980) (duration of sentence may violate Kansas Bill of Rights, §9). State v. Tyler, 251 Kan. 616 (1992) (the Court again analyzed a cruel/unusual punishment claim under separate rational for a Federal and for a State challenge); State v. Schultz, 252 Kan. 819 (1993), (same as Tyler, *supra*.)

Weigel provides the criteria to be applied in the proportionality analysis required by Section 9 of the Kansas Bill of Rights in a question regarding the length of a sentence. Since the death penalty is undeniably qualitatively different from any prison sentence[7], surely the criteria defined in less serious cases should apply here. In fact, Weigel clearly holds that the listed criteria are only some of those which should be considered. Further, it is clear the Weigel decision went against the accused because *none* of the criteria was present in his case.

While none of the Weigel criteria should be ignored by this Court, it appears that violation of any of the criteria should cast doubt upon the present statute's constitutionality under Kansas' Section 9 proscription against cruel or unusual punishment.

The Colorado Court in Young clearly held that Colorado's constitutional proscription against cruel and unusual punishment provision, like its Federal counterpart, requires that a death sentence be both certain and reliable. The Court went on to analyze its statute – virtually identical to K.S.A. 21-4624 – and hold that the statute's balancing provision fails the certainty/reliability test. The Young court went on to say that the certainty/reliability requirements are based upon the recognition that there is a qualitative difference between the penalty of death and all other penalties:

> "a death sentence imposed in such circumstances violates the requirements of certainty and reliability and is *arbitrary and capricious in contravention of basic constitutional principles*" Young at 845; (emphasis added).

Weigel lists is "*arbitrariness* of infliction" as one of the criteria which underlies our state's cruel or unusual punishment clause. Weigel at 203. (emphasis added). The

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[7] Woodson v. North Carolina, 428 U.S. 280 (1978).

remaining Weigel criteria also weigh against permitting this statute to stand. When mitigators and aggravators are in equipoise, certainly the death sentence is *excessive, disproporionate, unnecessary,* and *unacceptable to society.* Id.

## CONCLUSION

K.S.A. 21-4624, in providing a mandatory death penalty unless the mitigation outweighs the aggravating circumstances is identical to the Colorado statute considered and found unconstitutional in People v. Young. Kansas' broader provision against cruel OR unusual punishments should provide at least the same protections as the Colorado provision.

Our cruel or unusual punishment clause has been previously interpreted in cases involving length of punishment to provide broader protection of citizens than the United States Constitution. Although the request here is made solely under state law, it is persuasive that no United States Supreme Court case deals directly with the issue here presented. As in Colorado's unconstitutional statute, the defects in our statute can easily be remedied by legislative action, but as presently written, the Kansas death penalty is unconstitutional under Sections 9 and 18 of the Kansas Bill of Rights to the Kansas Constitution.

Respectfully submitted,

/s/ Ronald E. Wurtz
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(913) 296-6555
Supreme Court No. 7688

Attorney for the Accused

[Filed July 2, 1998]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS, Plaintiff | ) | |
| | ) | 98-81135-S |
| vs. | ) | |
| | ) | 96 CR 1157 |
| MICHAEL L. MARSH II, Defendant. | ) | Division 20 |

**TRANSCRIPT OF PRETRIAL HEARING**
**NOVEMBER 7TH, 1997 PROCEEDINGS**

Transcript of proceedings had and entered of record in the above-entitled case on the 7th day of November, 1997, before the Honorable Clark V. Owens II, Judge of Division 20. of the Eighteenth Judicial District of Kansas.

APPEARANCES:

For the State:

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Mr. Kevin O'Connor
Assistant District Attorneys
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Wichita, Ks. 67203

For the Defendant:

Mr. Ronald E. Wurtz and
Mr. Jeffrey A. Moots
Death Penalty Defense Unit
112 SW Sixth Street, Suite 302
Topeka, Ks. 66603

* * *

[Court] [41] The next one is case filing Number 41, which is the Motion to Strike Death Penalty Sentence for Unconstitutional Weighing of Aggravators and Mitigation.

The defense maintains that the Kansas Death Penalty is unconstitutional since it provides for the jury to impose a death penalty if it finds aggravating factors which are not outweighed by mitigating factors. The statute would provide for a death verdict if the aggravating factors and mitigating factors balanced equally.

The defense relies upon the Colorado case of People versus Young, where the Colorado Supreme Court is interpreting the Colorado State Constitution.

The state relies upon the United States Supreme [42] Court decision of Walton v. Arizona that finds it permissible under the United States Constitution to require the defense to prove mitigating circumstances by a preponderance of the evidence.

I believe that the Kansas Supreme Court would be hesitant to interpret its own Constitution more strictly than the United States Constitution as interpreted by the United States Supreme Court.

The Walton case appears to be the controlling case on this issue. So, for that reason I'm going to overrule the motion.

* * *

[Filed January 15, 1998]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Plaintiff,<br><br>VS.<br><br>MICHAEL L. MARSH, II,<br>Defendant. | ) | CASE NO. 96 CR 1157 |

**INSTRUCTIONS**

Given by

JUDGE CLARK V. OWENS II

APPEARANCES:

For the State of Kansas: James E. Puntch, Jr.
Kevin O'Connor
Assistant District Attorneys
535 N. Main
Wichita, Kansas 67203

For the Defendant: Ronald E. Wurtz
Jeffrey A. Moots
Death Penalty Defense Unit
112 S.W. 6th Street, Suite 302
Topeka, Kansas 66603

INSTRUCTION NO. 1

Members of the Jury: It is my duty to instruct you in the law that applies to this case and it is your duty to follow all of the instructions. You must not single out one or more instruction and disregard others. You should construe each instruction in the light of and in harmony with the other instructions, and you should decide the sentence by applying the law to the facts as you find them. The order in which the instructions are given is no indication of their relative importance.

At times during the trial, the Court has ruled upon the admissibility of evidence. You must not concern yourself with the reasons for these rulings. I have not meant to indicate any opinion as to the facts or as to what your verdict should be by anything that I have said or done.

Your verdict must be founded upon the evidence admitted and the law as given in these instructions. It cannot be based upon any other consideration whatsoever.

In your determination of sentence you should consider and weigh everything admitted into evidence from the guilt phase or penalty phase of this trial that bears on an aggravating or mitigating circumstance. This includes testimony of witnesses, admissions or stipulations of the parties, and any admitted exhibits. You must disregard any testimony or exhibit which I did not admit into evidence.

INSTRUCTION NO. 2

The laws of Kansas provide that a separate sentencing proceeding shall be conducted when a defendant has been found guilty of capital murder to determine whether the defendant shall be sentenced to death. At the hearing, the trial jury shall consider aggravating or mitigating circumstances relevant to the question of the sentence.

INSTRUCTION NO. 3

In determining which sentence you may impose in this case, you may consider only those aggravating circumstances set forth in these instructions.

The State of Kansas contends that the following aggravating circumstances are shown from the evidence:

1. That the defendant knowingly or purposely killed or created a great risk of death to more than one person. and/or

2. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution. and/or

3. That the defendant committed the crime in an especially heinous, atrocious or cruel manner. The term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile; "cruel" means pitiless or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the sufferings of others.

A crime is committed in an especially heinous, atrocious, or cruel manner where the perpetrator inflicts serious mental anguish or serious physical abuse before the victim's death. Mental anguish includes a victim's uncertainty as to his or her ultimate fate.

INSTRUCTION NO. 4

A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.

The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted.

The defendant contends that mitigating circumstances include but are not limited to the following factors and you must review each for consideration:

1. The defendant has no significant history of prior criminal activity.
2. The crime was committed while the defendant was under the influence of mental or emotional disturbance.
3. The defendant acted under distress or under the domination of another person.
4. The age of the defendant at the time of the crime.
5. The defendant was not the sole cause of the death of Marry Elizabeth Pusch, rather the unlawful or improper administration of drugs contributed to her death.
6. Another person shares significantly in the guilt of the crime of capital murder.
7. The defendant's emotional immaturity.
8. The defendant's expressions of remorse.
9. The defendant's acceptance of responsibility for the crimes.
10. While in high school Michael Marsh saved the life of his friend, Michael Unruh.
11. The execution of Michael Marsh would have a devastating emotional effect on his friends.
12. Michael Marsh has relationships with people who care deeply for him.
13. Michael Marsh's has a history of emotional difficulty as demonstrated by his history of self-injury and hospitalization in California.
14. Michael Marsh was not the sole participant in the crimes committed at 1749 South Washington on June 17, 1996.
15. Michael Marsh's behavior during the trial.

16. Michael Marsh confessed to involvement in the crimes of which he was convicted.

17. Michael Marsh is a talented artist.

18. Any other circumstance which is found, in fairness or mercy, may serve as a basis for a sentence other than death.

Each juror must consider every mitigating factor that he or she individually finds to exist.

INSTRUCTION NO. 5

The State has the burden to prove to you beyond a reasonable doubt that there are one or more aggravating circumstances. If you find that one or more aggravating circumstances have been so proven, the State must then prove beyond a reasonable doubt that they are not outweighed by any mitigating circumstances.

INSTRUCTION NO. 6

In making the determination whether aggravating circumstances exist that are not outweighed by any mitigating circumstances, you should keep in mind that your decision should not be determined by the number of aggravating or mitigating circumstances that are shown to exist.

INSTRUCTION NO. 7

It is for you to determine the weight and credit to be given the testimony of each witness. You have a right to use common knowledge and experience in regard to the matter about which a witness has testified.

INSTRUCTION NO. 8

You should not consider the fact that the defendant did not testify in arriving at your verdict.

INSTRUCTION NO. 9

The defendant is entitled to the individual opinion of each juror. Each of you must consider the evidence for the

purpose of reaching a verdict. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. Do not decide any question in a particular way simply because the majority of jurors, or any of them, favor such a decision.

INSTRUCTION NO. 10

If you find unanimously beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, then you shall impose a sentence of death. If you sentence the defendant to death, you must designate upon the verdict form with particularity the aggravating circumstances which you found beyond a reasonable doubt.

If you have a reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances, then you shall so indicate on your verdict form, and defendant will not be sentenced to death but will be sentenced by the court as provided by law.

INSTRUCTION NO. 11

At the conclusion of your deliberations you shall sign the verdict form upon which you agree.

The verdict forms provide the following alternative verdicts:

A. Finding beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, and sentencing the defendant to death;

OR

B. Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances and sentencing the defendant to life imprisonment with parole eligibility set by the Court at either 25 years or 40 years.

INSTRUCTION NO. 12

The presiding juror will continue to preside over your deliberations in this proceeding. He will speak for the jury in court, and will sign the verdict you agree upon.

In order to reach a verdict in this case, your decision must be unanimous. If the jury after reasonable deliberation is unable to reach a unanimous verdict, you shall so notify the Court and it will be a final decision and the defendant will not be sentenced to death but will be sentenced by the court as provided by law to life imprisonment with parole eligibility set by the court at either 25 years or 40 years.

You will now listen to the arguments of counsel whose right it is to discuss the evidence and the law. Statements, arguments and remarks of counsel are intended to help you in understanding the evidence and applying the law but they are not evidence. If any statements are made that you believe are not supported by evidence, they should be disregarded.

January 9, 1998
Date

/s/ Clark V. Owens II
Clark V. Owens II
District Judge

[Filed January 12, 1998]

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Plaintiff,<br><br>VS.<br><br>MICHAEL L. MARSH, II,<br>Defendant. | ) | CASE NO. 96 CR 1157 |

**VERDICT**

We, the Jury, impaneled and sworn, do upon our oath, unanimously find beyond a reasonable doubt that the following aggravating circumstances have been established by the evidence and are not outweighed by any mitigating circumstances found to exist. (The Presideing Juror shall place an "X" in front of such aggravating cirumstance(s).

__X__ 1. That the defendant knowingly or purposely killed or created a great risk of death ot more than on person.

__X__ 2. That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.

__X__ 3. That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

and so, therefore, unanimously sentence the defendant to death.

/s/ Kenneth J. Thompson
Presiding Juror

Date of this Verdict: January 12, 1998.

[Filed March 29, 2001]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

| | | |
|---|---|---|
| STATE OF KANSAS<br>Plaintiff-Appellee | ) | |
| vs. | ) | District Court Case No:<br>96CR1157 |
| MICHAEL L. MARSH II<br>Defendant-Appellant | ) | Appellate Court No:<br>98-81135-S |

**MOTION FOR STAY OR, IN THE ALTERNATIVE, MOTION FOR EXTENSION OF TIME TO FILE BRIEF**

Comes Now the defendant-appellant, Michael L. Marsh II, and moves this Court for a stay of the brief due date pending this Court's decision in State of Kansas v. Gary W. Kleypas, No. 98-80920-S or, in the alternative, for an extension of time to file the brief in the present case. In support of this motion, the following is stated:

1. On March 27, 2001, this Court denied Mr. Marsh's motion for reconsideration of its previous order directing appellant to file a brief not to exceed 200 pages, and further denied Mr. Marsh's motion for permission to file a brief not to exceed 475 pages.

2. The brief in this case is presently due on March 30, 2001.

3. Counsel, of course, has no choice but to comply with the Court's order directing appellant to file a brief not to exceed 200 pages. This will be a difficult, time consuming process, requiring counsel to determine the best way in which to set forth the facts and arguments competently and adequately within the 200-page limit while at the same time

protecting Mr. Marsh's constitutional rights to due process, equal protection, and the effective assistance of counsel under the 6th and 14th Amendments. See Smith v. Robbins, 528 U.S. 259, 276, 145 L.Ed.2d 756, 120 S.Ct. 746 (2000) (indigent defendants entitled to adequate and effective appellate review under Due Process Clause and Equal Protection Clause of the 14th Amendment) (citing Griffen v. Illinois, 351 U.S. 12, 20, 100 L.Ed. 891, 76 S.Ct. 585 (1956)); Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985); Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674, 104 S.Ct. 2052 (1984).

4. In the original Brief of Appellant which was provisionally filed on February 26, 2001, and rejected by this Court on March 1, 2001, twenty-one issues are raised which are common to the appeal in State v. Kleypas, which was argued on December 6, 2000, and is awaiting decision by this Court. This Court's decision on these issues in Kleypas will control the disposition of those issues in the present case. Consequently, a stay of the brief due date in the present case pending this Court's decision in Kleypas will alleviate the need to extensively brief the issues in this case which are common with those raised in Kleypas, and may even eliminate the need to raise some of those issues in the brief in the present case. Accordingly, counsel requests that the brief due date in this case be stayed pending this Court's decision in Kleypas.

5. In the alternative, because of the amount of additional work which will be necessary in order for counsel to comply with the Court's order to file a brief not to exceed 200 pages and still protect Mr. Marsh's constitutional rights to due process and to the effective assistance of counsel, if this Court decides that a stay of the brief due date pending a decision in Kleypas is not warranted, counsel needs an additional sixty (60) days in which to copmlete the brief on appeal.

WHEREFORE, counsel respectfully requests that this Court stay the brief due date pending its decision in State v. Kleypas or, in the alternative, for an extension of time of sixty (60) days until May 29, 2001, to complete the brief in the present case.

Respectfully submitted,

/s/ Rebecca E. Woodman
Rebecca E. Woodman #13393
Assistant Appellate Defender
700 Jackson, Suite 903
Topeka, KS 66603
(785) 296-5484

Attorney for Michael L. Marsh II

SUPREME COURT ORDER DISTRICT CASE NO. 96CF1157
[Dated April 12, 2001]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

Jessica R Kunen
Chief Appellate Defender
700 Jackson
Topeka KS 66603-3740

| | | |
|---|---|---|
| STATE OF KANSAS,<br>Appellee,<br><br>V.<br><br>MICHAEL LEE MARSH, II,<br>Appellant. | ) | CASE NO: 98-81135-S |

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

Motion for Stay or in the Alternative, Motion for Extension of Time to File Brief by Appellant, Michael Marsh.

GRANTED IN PART. The briefing schedule is hereby stayed. Appellant's brief is due on or before 60 days after decision date of the State v. Kleypas decision. Response noted.

Date: 04/12/2001.

Carol G. Green
Clerk

[Received March 8, 2002]

No. 98-81135-S

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IN THE SUPREME COURT
OF THE STATE OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

vs.

MICHAEL L. MARSH II
Defendant-Appellant

---

# BRIEF OF APPELLANT

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APPEAL FROM THE DISTRICT COURTOF
SEDGWICK COUNTY, KANSAS
HONORABLE CLARK V OWENS, JUDGE
DISTRICT COURT CASE NO. 96CR1157

Rebecca E. Woodman #13393
Assistant Appellate Defender
Appellate Defender Office
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(785) 296-5484

Attorney for the Appellant

* * *

## PENALTY PHASE/SENTENCING REVIEW

**Issue 19: Because Mr. Marsh's death sentence was determined pursuant to the same weighing equation under K.S.A. 21-4624(e) which this Court found unconstitutional in State v. Kleypas, his death sentence must be set aside.**

In State v. Kleypas, slip op. at 149-168, this Court held that the weighing equation under K.S.A. 21-4624(e), which mandates a death sentence if the aggravating and mitigating circumstances are in equipoise, violates the 8th and 14th Amendments. Because this unconstitutional weighing equation was applied in Mr. Marsh's case, over defense counsel's objection (R. 5, 450-451; R. 8, 780-786; R. 12, 1196-1197, 1201-1202; R. 27, 42), Mr. Marsh's death sentence must be vacated and, at the very least, his case must be remanded for a new penalty phase hearing. See Id., slip op. at 172.

Nevertheless, the disposition in Kleypas, which reconstructed K.S.A. 21-4624(e) in a constitutional manner, is contrary to the proper disposition specifically set forth in K.S.A. 21-4629, and also violates well-established rules of statutory construction. For these reasons, the proper disposition of this case is to set aside Mr. Marsh's death sentence, and remand his case for resentencing to a life sentence.

First, the Kansas legislature has expressly set forth the proper disposition of this case in K.S.A. 21-4629, which provides: "In the event a sentence of death *or any provision of this act authorizing such sentence* is held to be unconstitutional by the supreme court of Kansas or the United States supreme court, the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence

and resentence the defendant as otherwise provided by law". (Emphasis added). This statute was neither cited nor discussed in the Kleypas opinion.

This Court's finding in Kleypas that the weighing equation contained in K.S.A. 21-4624(e) violates the 8th and 14th Amendments is a finding that a central provision of the act which authorized the death sentence imposed against Mr. Marsh in this case is unconstitutional. K.S.A. 21-4629 does not require a finding that the entire statutory scheme for imposing a death sentence is unconstitutional, only that "any provision of this act authorizing such sentence" be held to be unconstitutional. The weighing equation clearly is such a provision. Accordingly, the disposition mandated by that statute applies in this case. See Hicks v. Oklahoma, 447 U.S. at 346(defendant has liberty interest, secure under the due process clause of 14th Amendment, in a right provided by a state statute).

Under the plain language of K.S.A. 21-4629, the death sentence imposed against Mr. Marsh must be vacated and the case remanded to the district court with directions to "resentence the defendant as otherwise provided by law", that is, to a life sentence.

Second, the Court's rewriting of the weighing equation is contrary to well established rules of statutory construction and violates the doctrine of separation of powers. See Kleypas, slip op. at 168-172 (while finding that weighing equation in K.S.A. 21-4624(e) is unconstitutional under the 8th and 14th Amendments, the Court in Kleypas nevertheless held that the statute is not unconstitutional "on its face" and proceeded to construe the statute in a manner deemed constitutional).

In Hearn v. City of Overland Park, 244 Kan. 638 (1989), the Court stated that an ordinance is unconstitutional "on its face" when it is "invalid *in toto* -- and therefore incapable of any valid application." 244 Kan. at 641, quoting Hoffman

Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 494 n.5 (1982). Given this Court's finding that "[w]e see no way that the weighing equation in K.S.A. 21-4624(e) ... is permissible under the Eighth and Fourteen Amendments" (slip op. at 168), the "tie goes to the state"weighing equation is incapable of any valid application; the weighing equation as set forth by the legislature simply cannot be applied in a constitutionally valid manner. Hence, the statute *is* invalid on its face, and this Court's attempt in Kleypas to construe it in a constitutional manner is unwarranted.

The rule that a statute may be construed in a constitutional manner by "reading the necessary judicial requirements into the statute" (slip op. at 170) is applicable when addressing statutes which are overbroad or vague. See, e.g., State v. Huffman, 228 Kan. 186 (1980); State v. Motion Picture Entitled "The Bet", 219 Kan. 64, 70 (1976). See generally Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. at 494. This rule, however, cannot be applied to a statute which is plain and unambiguous. There is a marked distinction between construing a nebulous term like "obscenity" in a specific manner and in construing precise words to mean the exact opposite of what they actually say. In Harris v. Shanahan, 192 Kan. 183, 195-196 (1963), the Court stated: "This court has the power to declare a legislative act invalid when it infringes the superior law, but it has no power to correct or amend an act, or even construe it when expressed in plain and unambiguous language. The general rule is that where the statute is plain and unambiguous, there is no room left for judicial construction so as to change the language employed therein." The Court's reconstruction of the unambiguous language used in the weighing equation set forth in K.S.A. 21-4624(e) violates this basic rule.

Further, even when the use of vague or overbroad language in a statute warrants judicial interpretation, such an interpretation is appropriate only "when it can be done

within the apparent intent of the legislature in passing the statute". (Slip op. at 171, quoting State v. Durrant, 244 Kan. 522, 534-535 (1989)). In addressing legislative intent, the Court simply states: "The legislative intent in passing the death penalty act is obvious." (Slip op. at 171). Yet, as Justice Davis aptly notes in his dissenting opinion in Kleypas, the legislature intended to include the precise weighing equation which the majority of the Court found violated the 8th Amendment. (Slip op. at 314-315) As both the Court's majority opinion and Justice Davis' dissenting opinion in Kleypas acknowledged, the Attorney General advised the legislature of the pending constitutional challenge to the "tie goes to the state" weighing equation and suggested that the statute be amended to provide that a "tie goes to the defendant". (Slip op. 167, 314). Despite this recommendation, the legislature chose to use the specific weighing equation set forth in K.S.A. 21-4624(e). In light of such a knowing and conscious decision by the legislature, the presumption that the legislature intended to pass a constitutional statute cannot be applied. Under these circumstances, the Court's unauthorized rewriting of the statute violates the separation of powers, which in turn violates the guarantee of a republican form of government as set forth in clause of Article IV, section 4 of the United States Constitution. See Van Sickle v. Shanahan, 212 Kan. 426, 447 (1973).

For the reasons set forth herein, the rules of construction applied by the Court in Kleypas cannot be employed given the unambiguous language used in the statute and the evidence that the legislature intentionally chose to use that language. Accordingly, that part of the Kleypas decision must be overruled.

* * *

[Received January 7, 2003]

No. 98-81135-S

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IN THE SUPREME COURT
OF THE STATE OF KANSAS

---

STATE OF KANSAS
Plaintiff / Appellee

v.

MICHAEL L. MARSH II
Defendant / Appellant

---

# BRIEF OF APPELLEE

---

APPEAL FROM THE DISTRICT COURT OF
SEDGWICK COUNTY, KANSAS
THE HONORABLE CLARK V. OWENS
DISTRICT COURT JUDGE ASSIGNED
DISTRICT COURT CASE NO. 96-CR-1157

Kristafer Ailslieger, #19626
Assistant Attorney General
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* * *

**XIX. The State concedes that under *State v. Kleypas*, Defendant's death sentence must be vacated and his case remanded for resentencing under K.S.A. 21-4624(e) as construed by this Court.**

Under the heading of issue 19, Defendant actually raises three separate issues: (1) under *State v. Kleypas, supra*, his death sentence must be vacated, (2) under K.S.A. 21-4629, he cannot be resentenced to death, and (3) this Court's construction of K.S.A. 21-4624(e) was erroneous and violated the doctrine of separation of powers. Each of these sub-issues will be addressed separately below.

**A. Under *State v. Kleypas*, Defendant's death sentence must be vacated and his case remanded for resentencing.**

In *Kleypas, supra*, this Court found the application of the weighing equation in K.S.A. 21-4624(e) with respect to aggravating and mitigating factors to be unconstitutional when such application could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise. 40 P.3d at 232. Because Defendant's death sentence was imposed as a result of the same unconstitutional application of K.S.A. 21-4624(e) as occurred in *Kleypas*, the State concedes that his sentence must be set aside and his case remanded for resentencing in accordance with the *Kleypas* decision. 40 P.3d at 234.

**B. K.S.A. 21-4629 does not prevent the re-imposition of the death penalty following a second penalty hearing before a jury.**

**Standard of Review**

Interpretation of a statute is a question of law over which this Court exercises *de novo* review. *State v. Lewis*, 263 Kan. 843, 847 (1998).

**Argument**

Defendant's argument is based on an overly literal interpretation of K.S.A. 21-4629. However, he misses the purpose of the statute and the substance of the *Kleypas* decision. K.S.A. 21-4629 exists as a safety net to provide direction in the event that the death penalty is found to be unconstitutional. However, the *Kleypas* Court did not determine that the death penalty was unconstitutional, it only determined that the weighing equation used by the jury to determine the appropriateness of the death penalty in that particular case was unconstitutional. The *Kleypas* Court neither held that the sentence of death was *per se* unconstitutional, nor that the statute authorizing it, K.S.A. 21-4624, was unconstitutional. The *Kleypas* Court held only that the particular *application* of K.S.A. 21-4624(e) that led to the imposition of the death penalty in that case was unconstitutional. However, the death penalty itself remains a valid, constitutional option under Kansas law. Therefore, K.S.A. 21-4629 is inapplicable.

However, even if K.S.A. 21-4629 were to apply to this situation, it does not prohibit the re-imposition of the death penalty. It states that the sentencing court shall "resentence the defendant as otherwise provided by law." Because the death sentence remains a sentence "provided by law" in Kansas, K.S.A. 21-4629 does not act as a bar to a second imposition of the same sentence if a jury finds it to be appropriate.

Defendant's citation to *Hicks v. Oklahoma*, 447 U.S. 343 (1980) is misplaced. It is so factually and legally dissimilar as to be completely inapposite. In *Hicks*, a defendant was sentenced to a mandatory 40 year term in accordance with a habitual violator statute that was later determined to be unconstitutional. 447 U.S. at 344-45. The Oklahoma courts subsequently affirmed his sentence, however, because it was still within the range permissible for his crime. 447 U.S. at

345. On review, the Supreme Court held that affirming the sentence violated the defendant's due process rights because it denied him the possibility that, absent the unconstitutional mandatory minimum, a jury might have returned a lesser sentence. 447 U.S. at 347. This is in no way applicable to the present case. On remand, the fu'l range of sentencing options applicable to Defendant's crime of conviction remains available.

**C. This Court's construction of K.S.A. 21-4624(e) in *State v. Kleypas* was within the Court's lawful authority and did not violate the separation of powers doctrine.**

**Standard of Review**

The constitutionality of a statute is a question of law over which this Court exercises *de novo* review. *State v. Kleypas*, 40 P.3d 139, 224 (2001). Logic dictates that review of the Court's own prior decision on the constitutionality of statute is likewise de novo.

**Argument**

Defendant misapprehends this Court's reasoning in *Kleypas* to conclude that, in spite of this Court's statement otherwise, K.S.A. 21-4624(e) is unconstitutional on its face. This Court clearly held that K.S.A. 21-4624(e) is not unconstitutional on its face. 40 P.3d at 232. Rather, the Court found that the application of K.S.A. 21-4624(e) under circumstances which could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise was unconstitutional. 40 P.3d at 232. The Court then proceeded to construe the statute so that it could not be applied in such an unconstitutional manner in the future. 40 P.3d at 232-34.

As originally written, K.S.A. 21-4624(e) allowed the imposition of the death penalty when (a) the jury found the aggravating factors outweighed the mitigating factors, and (b) when the jury found the aggravating factors and the mitigating factors were in equipoise. This Court found the

first situation to be constitutional, but the latter to be unconstitutional. Therefore, any application of the statute in which the latter situation was a possibility would be unconstitutional. That is what happened in *Kleypas*. Because there was the *possibility* that the aggravators and mitigators were in equipoise (although there is no way of knowing), the application of the statute was unconstitutional in that instance. The same is true in the present case.

However, that does not mean the statute is unconstitutional *in toto* as suggested by Defendant. It is still constitutional to impose the death penalty under K.S.A. 21-4624 when there is a jury finding that the aggravators outweigh the mitigators. That was the case before *Kleypas*, and it remains the case. The only effect of the *Kleypas* decision was the elimination of the possibility of imposition of the death penalty when the aggravators and mitigators are in equipoise. This did not require a substantial re-writing of the statute, nor did it usurp the role of the legislature. It simply required the Court, under its authority as the supreme arbiter of state law, to exercise its duty to reasonably construe statutes in such a way as to uphold their constitutionality and meet the intent of the legislature.

The *Kleypas* Court did not engage in any type of unprincipled legislation from the bench, but rather followed established rules of construction and case law. *See State v. Durrant*, 244 Kan. 522 (1982); *In re Adoption of Baby Boy L.*, 231 Kan. 199 (1982); *State v. Motion Picture Entitled "The Bet,"* 219 Kan. 64 (1976); *State v. Gunzelman*, 210 Kan. 481 (1972); *State v. Hart*, 200 Kan. 153 (1967). While the State obviously desired a somewhat different result in *Kleypas*, the State cannot take issue with the *Kleypas* Court's explanation for its authority to construe the statute as it did. It cannot be said that the *Kleypas* Court acted outside of its authority or violated the doctrine of separation of powers. The legislature intended to enact a death penalty statute, and the Court simply construed the statute to meet that intent in a

manner determined necessary by the Court to meet constitutional requirements. Defendant's arguments that the Court engaged in an unauthorized rewriting of the statute, and that the entire statute is unconstitutional on its face, are without merit.

**XX. The State concedes that under *State v. Kleypas*, the penalty phase verdict form suggesting that the jury must be unanimous in a decision to impose a life sentence rather than death was erroneous and requires reversal of Defendant's death sentence.**

The State concedes that the penalty phase verdict form applying to the imposition of a life sentence (R. Vol. 12, p. 1204) incorrectly advised the jury that a decision to impose such a sentence must be unanimous. Under *Kleypas*, this error requires vacating Defendant's death sentence and remanding for a new penalty phase. 40 P.3d at 260.

* * *

[Filed December 29, 2004]

IN THE SUPREME COURT
OF THE STATE OF KANSAS

STATE OF KANSAS,

Plaintiff / Appellee,

v. Case No: 98-81135-S

MICHAEL LEE MARSH, II,

Defendant / Appellant.

---

MOTION FOR REHEARING

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APPEARS NOW the State of Kansas, by and through Phill Kline, Attorney General, and Kristafer R. Ailslieger, Assistant Attorney General, and respectfully moves for a rehearing in the above-captioned matter in order to address the applicability of the severability provision of K.S.A. 21-4630 to K.S.A. 21-4624 (the death penalty statute), and whether application of K.S.A. 21-4630 will allow the unconstitutional "equipoise" provision to be severed and the remaining constitutional provisions of the death penalty statute be given effect. In support of this motion, the State submits the following:

[1.] In its opinion released on December 17, 2004, in which this Court determined that the Kansas death penalty statute (K.S.A. 21-4624) was unconstitutional on its face, neither the majority nor any of the dissents addressed the applicability of the severability provision of K.S.A. 21-4630.

[2.] The State submits that with proper application of K.S.A. 21-4630, the unconstitutional "equipoise" provision can be eliminated from the death penalty statute and the remaining statutory language can be given effect without

violating the United States Constitution, consistent with the intent of the Kansas Legislature and the will of the people of Kansas.

[3.]K.S.A. 21-4630 provides:

> If any provisions of this act or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provisions or application, and to this end the provisions of this act are severable.

[4.]The State contends that, by application of K.S.A. 21-4630, the provision of K.S.A. 21-4624 imposing the death sentence when the jury finds the aggravating and mitigating factors in equipoise, can be severed without rewriting the statute or invading the province of the legislature, and that the remaining statutory provisions can be given effect consistent with the United States Constitution and the clear legislative intent. By striking three words and a suffix -- a grand total of nine letters -- from K.S.A. 21-4624(e), the unconstitutional provision can be eliminated and the remaining constitutionally sound provisions can be given effect.

[5.]K.S.A. 21-4624(e) reads, in pertinent part, "If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." The effect of this, as this Court is well aware, is that if the jury determines the aggravating and mitigating factors are equal, the defendant shall be sentenced to death. This Court has determined this "equipoise" provision to be unconstitutional.[1] However, this does not require the

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[1]The State still holds the position that the statute as written is constitutional, but for the sake of this Motion for Rehearing, the State

invalidation of the entire death penalty statute because K.S.A. 21-4630 allows for the severance of unconstitutional provisions in order to give effect to the constitutional provisions. By striking the words "is not," the suffix "-ed" from the word "outweighed," and the word "by," the equipoise provision can be eliminated while the rest of the statute remains intact.[2] The statute would thus read, in pertinent part, "If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances outweigh any mitigating circumstances which are found to exist, the defendant shall be sentenced to death." Thus, by striking, **not rewriting**, words in the statute, the equipoise provision can be eliminated while the remaining provisions of the statute, and the intent of the legislature and the people of Kansas can be given effect consistent with the United States Constitution.

[6.] There is substantial case law supporting this approach. This Court has long recognized that "[t]he general doctrine is that only the invalid parts of a statute are

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accepts this Court's interpretation to the contrary. The State did not argue for the constitutionality of the statute as written in its brief because at the time, *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001),was controlling law, and had been resolved contrary to the State's position. The State did not believe it was appropriate to raise an argument before this Court which it had already been squarely considered and decided only a matter of months earlier, with no intervening change in the law. However, this should not be viewed as a concession of the issue. The State could not reasonably foresee that this Court would overrule *Kleypas*. Should this Motion for Rehearing be denied, or should the Court uphold its present ruling upon rehearing, the State still intends to seek review by the United States Supreme Court, challenging this Court's determination that the weighing equation in K.S.A. 21-4624 violates the United States Constitution.

[2] "If, by unanimous vote, the jury finds . . . that the existence of such aggravating circumstances ~~is not~~ outweigh~~ed by~~ any mitigating circumstances which are found to exist, the defendant shall be sentenced to death."

without legal efficacy." *State v. Smiley*, 65 Kan. 240, 247, 69 P. 199 (1902). "Where parts of a statute or a section of a statute can be readily separated, then the part which is constitutional may stand while the unconstitutional part is rejected. *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 316, 955 P.2d 1136 (1998) (citing *Voran v. Wright*, 129 Kan. 601, Syl. ¶ 6, 284 P. 807 (1930)). Application of this rule occurs most often "where separable words, clauses, sentences, or sections of the statute are stricken out . . . because [they are] constitutionally objectionable." *Smiley*, 65 Kan. at 248. However, the rule applies as well "to exclude parts of the verbal phraseology." *Id.* The only caveat to this rule is that "if the void and valid parts of the statute are so connected with each other in the general scheme of the act that they cannot be separated without violence to the evident intent of the legislature, the whole must fall." *Id.* at 247. Here, there can be no serious contention that striking the words proposed by the State, and thus eliminating the unconstitutional equipoise provision from the statute, will do violence to the clear intent of the Kansas legislature to enact an effective and constitutional death penalty, especially when the legislature expressly included a severability provision. Accordingly, the severability doctrine should apply.

[7.] A court does not invade the province of the legislature by striking from a statute language which creates an unconstitutional provision or application. This Court long ago acknowledged:

> Throughout the entire history of English and American law the courts have been ruling that the general words of statutes were to be restrained in import and application whenever the taking of them in literal sense would lead to absurd or hurtful consequences, and the same is true under the

> American system of written constitutions, whenever the taking of general words in their full signification would expose them to conflict with the organic law. It is but an affectation of sensitiveness of regard for the constitution which often leads courts to beat down the whole of a legislative enactment because of its opposition to the fundamental ordinance in some minor particular, instead of adjusting it to harmonize with the controlling provision.

*Smiley*, 65 Kan. at 249-250. Further, the *Smiley* Court noted:

> If the intention of any part of the act, determined upon settled principles of legal interpretation, were to obstruct or impede the exercise or enjoyment of any right secured by the constitution of the United States, or by any constitutional law of the United States, that part would be unconstitutional. But if the intention thus determined were merely to establish, regulate, or guarantee rights or privileges consistent with the constitution and laws of the United States, in a mode not in conflict with either, and if the act would constitutionally apply to a large class of cases that do and will exist, it would not be rendered unconstitutional by the fact that, literally construed, its language might be broad enough to extend to a few exceptional cases where it could not constitutionally apply; since, upon settled principles of construction, the latter are as fully and effectively excepted by necessary implication, as if the statute had contained an express proviso that it should not extend or apply to such cases. *The rule of construction universally adopted is that, when a statute may constitutionally operate upon certain persons, or in certain cases, and was not*

> *evidently intended to conflict with the constitution, it is not to be held unconstitutional merely because there may be persons to whom or cases in which it cannot constitutionally apply; but it is to be deemed constitutional, and to be construed not to apply to the latter persons or cases, on the ground that the courts are bound to presume that the legislature did not intend to violate the constitution.*

*Id.* at 250-51 (citation omitted) (emphasis added). This is directly applicable to the death penalty statute at issue -- this Court held it to be unconstitutional *in toto* on the basis that it could not constitutionally be applied in the extremely unlikely event that all twelve members of a penalty-phase jury determined that the aggravating and mitigating factors were in equipoise, in spite of the fact that in the vast majority of cases, the statute could and would be applied in a constitutional fashion, and that the legislature clearly intended to enact a constitutional death penalty. This ruling directly contravenes the rule cited above, espoused by this Court over 100 years ago. Moreover, lest one suggest that the principles articulated in *Smiley* are anachronistic and outdated, the same rule quoted above was reiterated by this Court as recently as 1985. *State v. Barclay*, 238 Kan. 148, 708 P.2d 972 (quoting with favor *Smiley*, 65 Kan. at 250-51).

[8.] Modern application of the severability doctrine holds:

> Whether the court may sever an unconstitutional provision from a statute and leave the remainder in force and effect depends on the intent of the legislature. If from examination of a statute it can be said that the act would have been passed without the objectional (sic) portion and if the statute would operate effectively to carry out the intention of the

legislature with such portion stricken, the remainder of the valid law will stand.

*Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023, 850 P.2d 773 (1993). Here, there can be no doubt that the Kansas legislature fully supported the death penalty and intended to enact a constitutional death penalty. It is questionable whether the legislature fully understood the nuances of the weighing equation and there is no indication that it gave particular concern to the exact wording of the weighing provision. It would be quite dubious to suggest that the legislature's support for the death penalty hinged on insuring that the weighing provision provided for the death penalty when the aggravators and mitigators were in equipoise. On the contrary, the only reasonable conclusion is that the Kansas legislature would have passed the death penalty statute even if the weighing provision did not include the words "is not outweighed by," and rather, simply said "outweigh." Eliminating the objectionable language from the death penalty does not change the scope of the death penalty law or violate the legislative intent.

[9.] That the legislature failed to change the law upon the attorney general's suggestion in 1995 does not undermine the State's position that striking the offending language will not do violence to the legislative intent. It has been mis-stated, both in *Kleypas* and in the present matter, that "The legislature rejected that suggestion of the attorney general and adopted our present statute." *State v. Marsh*, Slip op. at 36 (quoting *Kleypas*, Davis, J., dissenting); *Kleypas*, 272 Kan. at 1124 (Davis, J., dissenting). In actuality, the legislature adopted the present statute first (in 1994), and the attorney general's subsequent suggestion, contained in a broader proposal of changes to the statute (HB 2532) failed to reach a vote by the legislature as a whole. Thus, it cannot be said that the legislature was informed of the potential

constitutional infirmity in the weighing equation prior to enacting the statute and chose to enact it anyway, nor can it be said that the legislature affirmatively rejected the attorney general's suggestion to change the weighing equation because the full legislature never considered it.

[a.] At the time of enactment, the legislature simply lifted the words of the Hard 40 statute and created the present death penalty statute. Every indication is that the legislature intended to enact a constitutional death penalty, but there is no indication that the legislature specifically intended that in whatever form the death penalty was enacted, it absolutely had to provide for the death penalty when the aggravators and mitigators were equal, and that without such a provision, the legislature would not have enacted a death penalty.

[b.] That the legislature did not change the statute at the attorney general's suggestion is not indicative of a coherent desire to retain the equipoise provision. It must be recognized that House Bill 2532, which contained the attorney general's suggested change to the weighing equation, also contained multiple other proposed changes which included lowering the age of those eligible for the death penalty to 16, expanding the scope of crimes for which the death penalty would be available, increasing the time allowed for prosecutors to file notice of intent to seek the death penalty, and expanding the list of statutory aggravating factors. The bill was not limited to changing the weighing equation, and opposition to any of the many other proposed changes could explain why the bill never made it out of committee. One simply cannot conclude that the failure of this bill was because the legislature rejected the proposed change in the weighing equation. Further, because the suggested changes were never considered and voted on by the full legislature, the failure to change the law cannot be construed as demonstrative of the legislature's intent that the

equipoise provision be retained. Thus, the only truly clear legislative intent is that in 1994, the legislature intended to enact a constitutional death penalty, and intended that any provisions or application later found to be unconstitutional would be severed to save the constitutionality of the death penalty itself.

[10.] Application of the severability provision comports with this Court's long standing rules that "the constitutionality of a statute is presumed, that all doubts must be resolved in favor of its validity, and before the statute may be stricken down, it must clearly appear the statute violates the Constitution. Moreover, *it is the court's duty to uphold a statute under attack, whenever possible, rather than defeat it, and if there is any reasonable way to construe the statute as constitutionally valid, that should be done*." *Barclay*, 238 Kan. at 153 (citations omitted) (emphasis added).

[11.] In this instance, there is clearly a reasonable way to construe the statute as constitutionally valid by application of the well-recognized action of striking the offending language, consistent not only with rules recognized by this Court for more than a century, but also in accordance with the severability provision expressly provided for by the legislature.

[12.] Applying the severability doctrine to render the statute constitutional is not the same as applying the avoidance doctrine which this Court rejected in its decision in this case. The severability doctrine is distinctly different, and significantly, is not tied to whether the statute is vague and ambiguous. Rather, the severability doctrine is only concerned with whether the objectionable language can be stricken from the statute without wreaking a major change in the scope of the law or doing violence to the legislative intent.

[13.] That this is an important case of great public interest is obvious, and the fact that it is such a significant case further weighs in favor of rehearing in order to insure that every argument is considered and that the public retains trust in the criminal justice system as thorough, rational, and committed to full legal resolution of important issues. Further, the impact of this Court's decision in this case is not limited only to those death sentences imposed prior to *Kleypas*, but also has the anomalous effect of invalidating those subsequent to *Kleypas* which were clearly imposed in a constitutional matter.[3] The decision also affects several current capital prosecutions in which the death penalty is being sought by the State. These are all cases of great public interest both to the state as a whole, and to the individual communities where the crimes took place. While neither the great public interest, nor the anomalous effect on otherwise constitutional death sentences, nor the impact on current and future prosecutions override constitutional principles, all militate in favor of rehearing to consider this possible avenue of saving this duly enacted law that still enjoys widespread support from a majority of the people of Kansas.

[14.] As neither the majority opinion nor the dissenting opinions discuss, or even mention the severability statute, it appears that this provision has been overlooked.[4] Given this, along with the obvious importance of this case and substantial public interest, coupled with this Court's duty to uphold a statute under attack whenever possible, the State respectfully suggests

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[3] In accordance with *Kleypas*, all subsequent death penalty juries were instructed that the aggravators had to outweigh the mitigators

[4] The applicability of the severability provision was not raised in the State's brief because at the time, *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), was still controlling law and its holding obviated the need for any such severability discussion.

that a rehearing to address this particular issue is not only necessary, but compelled.

WHEREFORE, for the foregoing reasons, the State respectfully requests that this Court grant its motion, and schedule a rehearing in the above-captioned matter.

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL PHILL KLINE

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[Filed January 6, 2005]

IN THE SUPREME COURT OF
THE STATE OF KANSAS

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| STATE OF KANSAS<br>Plaintiff-Appellee | ) | |
| | ) | District Court Case No. 96CR1157 |
| vs. | ) | Appellate Court No. 98-81135-S |
| MICHAEL L. MARSH II<br>Defendant-Appellant | ) | |

**RESPONSE TO STATE'S MOTION FOR REHEARING**

Comes Now the defendant, Michael L. Marsh, by and through Rebecca E. Woodman, Capital Appellate Defender, and responds to the state's motion for rehearing in the above-captioned case, as follows:

1. In its motion, the state argues that the severability provision set forth in K.S.A. 21-4630 can be employed to "save" K.S.A. 21-4624(e) "without rewriting the statute or invading the province of the legislature." (Motion for Rehearing, at 2.) The state's argument aptly illustrates why the Court's decision in this case was correct. Despite its claim to the contrary, the state's argument constitutes the same rewrite of the plain and unambiguous language of K.S.A. 21-4624(e), which this Court rightfully held could not be done consistent with fundamental rules of statutory construction and separation of powers, and thus required the Court to overrule the part of the decision in *State v. Kleypas* that saved the statute through judicial reconstruction. *State of Kansas v. Michael Lee Marsh II*, _____ Kan. _____, No. 81,135, slip op., at 30-39 (December 17, 2004) (overruling in part *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001)).

2. Under K.S.A. 21-4630, an invalid provision can be severed only when other provisions "can be given effect without the invalid provisions or application." This simply cannot be done with the unambiguous language of K.S.A. 21-4624(e), which mandates death if the jury, after finding the existence of one or more aggravating circumstances, finds that "the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." This provision is susceptible to only one construction: Under the plain and unambiguous language of K.S.A. 21-4624(e), the state is not required to prove, and the jury is not required to find, that the aggravating circumstances outweigh mitigating circumstances; a death sentence is mandated if the jury finds that the aggravating circumstances and mitigating circumstances are equally balanced. It is only if the jury finds that the mitigating circumstances outweigh the aggravating circumstances that the defendant receives a *life* sentence. As the Court in *Kleypas* found, and reaffirmed in this case, K.S.A. 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments, because it mandates death when aggravating and mitigating circumstances are in equipoise. *Marsh*, slip op. at 26-30 (reaffirming holding a *Kleypas*, 272 Kan. at 1015-1016).

3. There can be no constitutionally valid application of the plain and unambiguous language of K.S.A. 21-4624(e), and severance cannot apply, because there is no separate and independent provision from which it can be severed. See *State ex rel. Tomasic v. Unified Gov. of Wyandotte Co./Kansas City*, 264 Kan. 293, 339-340, 955 P.2d 1136 (1998); *Thompson v. KFB Ins. Co.*, 252 Kan. 1010, 1023-1024, 850 P. 2d 773 (1993). It is a single statutory provision which the state is attempting to alter -- i.e., rewrite -- to mean the exact opposite of the express language enacted and intentionally chosen by the legislature. Not only is this contrary to the fundamental rules of statutory construction

set forth in this Court's decision in this case (*Marsh*, slip op. at 31 (quoting *State ex rel. Graeber v. Marion County Landfill, Inc.*, 276 Kan. 328, 339, 76 P. 3d 1000 (2003)), but it does violence to the legislative intent in the same way as did the Court's judicial rewrite of the statute in that part of *Kleypas* which was overruled in this case. *Marsh*, slip op. at 44. See *Thompson v. KFB Ins. Co.*, supra, 252 Kan. at 1023-1024 (severability inapplicable where result would violate legislative intent as expressed in language of statute).

4. The state's argument is also contrary to the disposition specifically provided by state statute, K.S.A. 21-4629, when any provision authorizing a death sentence is held unconstitutional by this Court. In that event, K.S.A. 21-4629 mandates that "the court having jurisdiction over a person previously sentenced shall cause such person to be brought before the court and shall modify the sentence and resentence the defendant as otherwise provided by law," that is, to a life sentence.

WHEREFORE, for the foregoing reasons, Mr. Marsh requests that the state's Motion for Rehearing in this case be denied.

Respectfully submitted,

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Attorney for Defendant Michael L. Marsh II

[Received April 20, 1999]

No. 98-80920-S

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**IN THE**
**SUPREME COURT OF THE STATE**
**OF KANSAS**

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STATE OF KANSAS
Plaintiff-Appellee

vs.

GARY W. KLEYPAS
Defendant-Appellant

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# BRIEF OF APPELLANT
# VOLUME III
# SENTENCING REVIEW AND CONSTITUTIONAL CHALLENGES

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Appeal from the District Court of Crawford County,
Kansas
Honorable Donald Noland, Judge
District Court Case No. 96 CR 240G

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* * *

**Constitutional Challenges**

**Issue XLIV: K.S.A. 21-4624(e) is unconstitutional in violation of the 8th and 14th Amendments to the United States Constitution and §9 and §18 of the Kansas Bill of Rights, because it mandates a death sentence even if the jury is unable to decide whether aggravating circumstances outweigh mitigating circumstances; the statute creates a presumption of death and shifts the burden of proof to the defendant to prevent a death sentence.**

K.S.A. 21-4624(e) provides, in pertinent part, as follows:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist *and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist*, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law. (Emphasis added.)

The language of K.S.A. 21-4624(e) thus requires a death sentence, not only when the jury finds that aggravating circumstances outweigh mitigating circumstances, but also when the jury decides that aggravators and mitigators are equally balanced, or is unable to decide one way or the other whether aggravating circumstances outweigh mitigating circumstances. Defense counsel filed a pretrial motion in this case, arguing that the weighing equation set forth in K.S.A. 21-4624 violates the state and federal constitutions because it mandates a death sentence if the aggravating and mitigation circumstances are in equipoise (R. 4, 821-822). The district court overruled the motion, finding that a Florida statutory scheme which "is quite similar to the method employed in Kansas" was approved by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 49

L.Ed.2d 913, 96 S.Ct. 2960 (1976), and further finding that "[i]ronically, it is the very thing that the defendant complains of – the weighing of the aggravating versus mitigating factors – that results in a constitutionally firm sentencing phase because the sentencer, through the weighing process, is both limited and guided in imposing sentence" (R. 4, 4, 5, 6). The district court did not address the fact that the statute mandates death even where the aggravating and mitigating circumstances are in equal balance, which was not an issue in Proffitt. See 428 U.S. 242. The jury was subsequently instructed in accordance with K.S.A. 21-4624(e), that it must impose a death sentence if it finds unanimously and beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances (R. 10, 2349). See also, P.I.K. Crim.3d 56.00-G and 56.00-H. The state emphasized to the jury during closing argument at the penalty phase that it must impose death even if the aggravating and mitigating factors are equally balanced (R. 71, 26-37, 62).

Contrary to the district court's finding, K.S.A. 21-4624(e) violates the federal and state constitutional prohibitions against cruel and/or unusual punishment and their guarantees of due process of law. See U.S. Const., 8th Amendment (prohibiting "cruel and unusual punishments"); Kansas Const., Bill of Rights §9(prohibiting "cruel or unusual punishment"); U.S. Const.,14th Amendment; Kansas Const., Bill of Rights §18(see State v. Thirty-six Pinball Machines, 222 Kan. 416, 419, 565 P.2d 236 (1977) (referring to §18 of the Kansas Bill of Rights as the due process clause of our state constitution)). K.S.A. 21-4624(e) violates the constitutional requisite of reliability in the determination that death is the appropriate sentence, and it creates an unconstitutional presumption of death that shifts the burden to the defendant to prove that he should not be sentenced to death.

Because of the qualitative difference between death and life imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976)(plurality opinion.) The sentence imposed at the penalty phase "'should reflect a reasoned *moral* response to the defendant's background, character, and crime.'" Penry v. Lynaugh, 492 U.S. 302, 319, 106 L.Ed.2d 256, 109 S.Ct. 2934 (1989)(quoting California v. Brown, 479 U.S. 538, 545, 93 L.Ed.2d 934, 107 S.Ct. 837 (1987)(O'Connor, J., concurring).) It is the sentencing authority, in this case the jury, that must consciously decide whether a sentence of death is the appropriate, i.e., deserved, sentence for a particular offender. See People v. Drake, 748 P.2d 1237, 1257 (Colo. 1988)(citing, *inter alia*, Spaziano v. Florida, 468 U.S. 447, 457-465, 82 L.Ed.2d 340, 104 S.Ct. 3154 (1984); Zant v. Stephens, 462 U.S. 862, 890, 77 L.Ed.2d 235, 103 S.Ct. 2733 (1983)). Even the Florida death penalty statute, to which the district court looked in finding that K.S.A. 21-4624(e) was constitutional, contains a final step requiring the jury to determine, based upon its weighing of aggravating and mitigating circumstances, "whether the defendant should be sentenced to life imprisonment or death." See Fla.Stat.Ann. §921.141(2).

In Kansas, the jury is never asked to make a conscious determination of whether death is the appropriate punishment. Instead, K.S.A. 21-4624(e) simply mandates death even when the jury is unable to decide one way or the other whether aggravating circumstances outweigh mitigating circumstances. Consequently, any sentence of death imposed under K.S.A. 21-4624(e) is unreliable, and violates the 8th and 14th Amendments, because it cannot be said with any confidence that it is the appropriate punishment. See State v. Wood, 648 P.2d 71, 80-81(Utah 1982)("We reject the proposition that the death penalty may

be imposed when there is substantial doubt whether it should be. To accept that proposition would be to permit the sentencing authority to assume an almost casual attitude in imposing capital punishment -- the most solemn and final act that the state can take against an individual...the death penalty may be imposed only when consistent with 'the fundamental respect for humanity underlying the Eighth Amendment.' [Woodson, 428 U.S. at 304.] That can only be achieved if sentencing procedures only permit imposition of the death penalty on the basis of a high degree of confidence that the penalty is appropriate".) See also, State v. Holland, 777 P.2d 1019, 1026-1028 (Utah 1989)(holding trial court committed plain error in sentencing defendant to death by failing to find beyond a reasonable doubt, after finding first that total aggravation outweighed total mitigation, that imposition of death penalty is justified and appropriate in the circumstances.)

Moreover, when a jury is forced to return a death sentence even though the aggravating and mitigating circumstances are equally balanced, or the jury is unable to decide whether aggravating circumstances outweigh mitigating circumstances, the jury is precluded from giving effect to the mitigating evidence which the defendant proffers as a basis for a sentence less than death. See Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978)(plurality opinion) (holding that death penalty statute must not preclude consideration of relevant mitigating factors); Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S.Ct. 869 (1982) (reaffirming that sentencer may not be precluded from considering, and may not refuse to consider, any relevant mitigating evidence offered by the defendant as a basis for a sentence less than death); Penry v. Lynaugh, 492 U.S. 302, 328 (1989)("In order to ensure 'reliability in the determination that death is the appropriate punishment in a specific case,'...the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's

background and character or the circumstances of the crime"(quoting Woodson, 428 U.S. at 305)).

A Kansas jury that determines that aggravating and mitigating circumstances are in equal balance is not allowed to give effect to the mitigating circumstances it has found. Rather than allowing the jury to resolve its doubt in favor of a life sentence by virtue of the evidence in mitigation, K.S.A. 21-4624(e) forces the jury to disregard the mitigating evidence altogether and impose the death penalty. See Jackson v. Dugger, 837 F.2d 1469, 1473-1474 (11th Cir. 1988)(Florida jury instruction that death presumed appropriate penalty unless aggravating circumstances are overridden by one or more mitigating circumstances vitiates individualized sentencing determination required by the 8th Amendment and is unconstitutional; instruction created risk that death penalty would be imposed in spite of factors which may call for a less severe penalty, and such an instruction "tilts the scales by which the jury is to balance aggravating and mitigation circumstances in favor of the state").

K.S.A. 21-4624(e) is fundamentally unfair and unconstitutional, not only because it renders unreliable any death sentence imposed under it, but also because it creates a burden-shifting presumption of death upon proof of an aggravating circumstance. The statute clearly creates a presumption of death by requiring death unless mitigating circumstances outweigh aggravating circumstances. If the state's only burden, once it proves the existence of an aggravating circumstance, is to prove that the aggravating circumstance and mitigating circumstance or circumstances, if any, are in equal balance, then the ultimate burden shifts to the defendant to avoid the death sentence by proving that the mitigating circumstances outweigh the aggravating circumstances.

In 1995, the House Judiciary Committee of the Kansas Legislature was made aware of the constitutional infirmity in K.S.A. 21-4624(e). In its Outline of Remarks by Attorney General Carla Stovall dated March 14, 1995, the Judiciary Committee noted a recommendation that the statute be amended to require that aggravating factors outweigh mitigating factors, and stated: "Now if they are equal, 'tie' goes to state. We're proposing 'tie' goes to defense..." See Appendix III-A, at 5. House Bill 2532 was introduced in the 1995 Kansas Legislative Session, which would have amended K.S.A. (1994 Supp.) 21-4624(e) to require that aggravating circumstances outweigh mitigating circumstances in order for a death sentence to be imposed. See Appendix III-B, at 8. However, the bill died in committee. See 1996 House Actions Report 51 (Kansas Legislative Information System, Final Report, May 23, 1996).

Indeed, Kansas is unique among the thirty-eight death penalty states in mandating death when the aggravating and mitigating circumstances are in equal balance. See Appendix in Brief of *Amicus Curiae*, The Cornell Death Penalty Project. And, in those states which previously had a sentencing formula like K.S.A. 21-4624(e), the formula was uniformly held to be fundamentally unfair in violation of due process, and in some cases was held to be unconstitutional in violation of both due process and the prohibition against cruel and unusual punishment under federal and/or state constitutional provisions.

In State v. Biegenwald, 106 N.J. 13, 524 A.2d 130 (1987), the capital sentencing jury was instructed in accordance with the New Jersey death penalty statute in effect at the time of trial, which stated that, "If the jury or the court finds that any aggravating factor exists and is not outweighed by one or more mitigating factors, the court shall sentence the defendant to death." 524 A.2d at 151-152, 153(quoting N.J. Stat.Ann. (1985) 2C:11-3c.(3)(a)). Considering the issue sua

sponte, the New Jersey Supreme Court reversed the death sentence imposed on the defendant, finding that the trial court's instruction requiring the jury to impose death if it found that the aggravating factors are not outweighed by the mitigating factors was fundamentally unfair, because "if aggravating and mitigating factors were of equal weight, the penalty would be death." 524 A.2d at 150-151, 153. The court stated:

> It is difficult to believe that the Legislature thought it fundamentally fair that a defendant be executed except where the mitigating factors outweigh the aggravating; the concept of executing him where the explanation for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors) is foreign to what the Legislature would certainly intend. We speak here about the ultimate value judgment, the ultimate question of life or death, for while the formulation is in terms of "beyond a reasonable doubt," and therefore appropriately applicable to fact-finding, the weighing process really is not fact-finding at all but a judgmental determination by the jury, based on conflicting values, of whether the defendant should live or die. See Barclay v. Florida, 463 U.S. 939, 950, 103 S.Ct. 3418, 3425, 77 L.Ed.2d 1134, 1144 (1983)(plurality opinion)("It is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing."). If anywhere in the criminal law a defendant is entitled to the benefit of doubt, it is here. We therefore hold that as a matter of fundamental fairness the jury must find that aggravating factors outweigh mitigating factors, and this balance must be found beyond a reasonable doubt.

524 A.2d at 156.

The New Jersey court also noted that a recently passed statutory amendment to the relevant statute was intended by

the legislature, as shown by the legislative history, to "'clarify that aggravating factors must outweigh any mitigating factors in order for a death sentence to be imposed.'" 524 A.2d at 156-157(citation omitted). The New Jersey statute now provides in relevant part that, "If the jury or the court finds that any aggravating factors exist and that all of the aggravating factors outweigh beyond a reasonable doubt all of the mitigating factors, the court shall sentence the defendant to death." N.J. Stat.Ann. §2C:11-3c.(3)(a). See Blystone v. Pennsylvania, 494 U.S. 299, 108 L.Ed.2d 255, 110 S.Ct. 1078 (1990)(upholding constitutionality of death penalty statute requiring jury to impose death sentence when aggravating factors outweigh mitigating factors); Boyde v. California, 494 U.S. 370, 108 L.Ed.2d 316, 110 S.Ct. 1190 (1990)(same).

In People v. Young, 814 P.2d 834 (Colo. 1991), a statute substantially similar to K.S.A. 21-4624(e) was held to violate the prohibition of cruel and unusual punishments and the right to due process of law under the Colorado constitution. The relevant portions of the statute at issue in *Young* read:

> [(2)(b)](III) In the event that the jury finds that at least one statutory aggravating factor has been proved beyond a reasonable doubt, and that there are insufficient statutory mitigating factors or other mitigating circumstances to outweigh any statutory aggravating factor or factors that were proved and any other aggravating circumstances that were proved, the jury shall return a sentence of death.

See 814 P.2d at 841. The statutory scheme at issue in Young eliminated an additional step in the previous version of the same statute, which instructed that "'finally, if the jury finds that any mitigating factors do not outweigh the proven statutory aggravating factors, it must decide whether the defendant should be sentenced to death or to life imprisonment.'" 814 P.2d at 840(quoting People v.

Tenneson, 788 P.2d 768, 789 (Colo. 1990)(quoting Colo.Rev. Stat. (1986) §16-11-103(2)(a)(III)).

Citing United States Supreme Court precedent that a sentence of death requires a greater degree of certainty and reliability (Mills v. Maryland, 486 U.S. 367, 100 L.Ed.2d 384, 108 S.Ct. 1860 (1988); California v. Ramos, 463 U.S. 992, 77 L.Ed.2d 1171, 103 S.Ct. 3446 (1983); Lockett v. Ohio, 438 U.S. 586; Woodson v. North Carolina, 428 U.S. 280), the Colorado Supreme Court found that the "[c]onsideration of the nature of the process of weighing aggravating and mitigating factors exposes the lack of reliability of a sentencing procedure that requires a sentence of death when those factors are in equipoise, in absence of any further required step." 814 P.2d at 843, 844. The court reasoned that:

> In the situation of equal balance between aggravating and mitigating factors, jurors engaged in the profoundly moral evaluation of the defendant's character and crime -- expressed by the statute as a process of weighing aggravating and mitigating factors -- will have concluded that the considerations suggesting that life imprisonment is the appropriate punishment weigh as heavily as those commending death. In other words, the jury would be unable to determine whether under statutory standards, death is the appropriate penalty.
>
> The result of a decision that the relevant considerations for and against imposition of the death penalty in a particular case are in equipoise is that the jury *cannot* determine with reliability and certainty that the death sentence is appropriate under the standards established by the legislature...A jury determination that [aggravators and mitigators] are in equipoise means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results. A death sentence

> imposed in such circumstances violates requirements of certainty and reliability and is arbitrary and capricious in contravention of basic constitutional principles.

814 P.2d at 844-845.

Finally, in Hulsey v. Sargent, 868 F.Supp. 1090 (E.D. Ark. 1993), the federal district court found that the Arkansas death penalty sentencing statute violated due process and was therefore unconstitutional, because it effectively mandated death if mitigating circumstances did not outweigh aggravating circumstances. The petitioner argued that the weighing equation created an impermissible presumption of death, and, although the burden of establishing that mitigation circumstances outweigh aggravating circumstances was not allocated under the statute, the weighing equation shifted the burden of persuasion to the defendant to prevent a death sentence. 868 F.Supp. at 1099. Analyzing the petitioner's claims, the court stated:

> Petitioner suggests two disturbing possibilities which, if true, establish due process violations. If a jury found the mitigating and aggravating circumstances in equipoise, neither one more probative than the other, or, could not fairly come to a conclusion about what balance existed between them, they would be obliged to impose the death sentence since the mitigating circumstances would not be found to outweigh the aggravating.

868 F.Supp. at 1101.

The Hulsey court found a critical distinction between the Arkansas statute and a statutory scheme containing a similar weighing equation but including a "saving" instruction permitting imposition of a life sentence even if the mitigating circumstances do not outweigh the aggravating circumstances. 868 F.Supp. at 1102 (citing Smith v. Armontrout, 888 F.2d 530 (Mo. 1989)(upholding

constitutionality of Missouri capital sentencing statute.)[92] Thus, the court held:

> Here, it is explicit in the statute that mitigating must outweigh aggravating circumstances and no saving instruction is found. Here too, the strictures of the Eighth and Fourteenth Amendments with their requirements of individualized sentencing and full consideration of evidence in mitigation appear to require relief...[T]he death presumption and burden-shifting claims may be collapsed into one inquiry: Whether the weighing equation as drawn "offends federal due process by effectively mandating death." The Court concludes that under the Arkansas statute under which petitioner was sentenced, it does.

868 F.Supp. at 1103. (Citation omitted).[93]

Subsequent to Hulsey, the Arkansas was amended to state that, in order to impose a death sentence, the jury must find

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[92]Indeed, in other cases upholding a sentencing formula requiring that mitigating circumstances outweigh aggravating circumstances, the formula included a similar "saving" instruction. See, e.g., People v. Tenneson, 788 P.2d 786 (Colo. 1990)(predecessor to statute struck down as unconstitutional in People v. Young, supra); Gray v. Lucas, 677 F.2d 1086 (5th Cir. 1982)(Mississippi).

[93]In Jones v. Dugger, 928 F.2d 1020 (11th Cir. 1991), the Eleventh Circuit Court of Appeals relied upon Walton v. Arizona, 497 U.S. 639, to uphold an instruction which shifted to the defendant the burden of proving that mitigating factors outweighed aggravating factors, stating that it was bound by Walton "to reject Jones' argument regarding the proper allocation of the burden to prove mitigating factors." 928 F.2d at 1029. However, the Jones court takes the holding in Walton too far. It is one thing to allocated to the defendant the burden of proving the existence of mitigating circumstances. See Walton, 497 U.S. at 649-650. It is quite another to require that the defendant not only prove the existence of mitigating circumstances, but also to prove that the mitigating circumstances outweigh the aggravating circumstances and thus prove that he should not be sentenced to death. Walton does not address the latter.

that "aggravating circumstances outweigh beyond a reasonable doubt mitigating circumstances found to exist." See A.C.A. §5-4-603(a). Like New Jersey's capital sentencing statute, the amended Arkansas statute is now in accord with the statutes found to be constitutional in Blystone, 494 U.S. 299, and Boyde, 494 U.S. 370.

K.S.A. 21-4624(e) is quite distinct from mandatory death penalty statutes which have been upheld by the United States Supreme Court. See Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990)(plurality opinion); Boyde, 494 U.S. 370; Blystone, 494 U.S. 299. Unlike K.S.A. 21-4624(e), the statutes at issue in Walton, Boyde and Blystone do not require the sentencer to impose death when aggravating and mitigating circumstances are equally balanced.

The statutes in both Boyde and Blystone require the jury to impose death only when the aggravating circumstances outweigh the mitigating circumstances. Boyde, 494 U.S. at 374 (jury instructed in accordance with California death penalty statute that it "shall impose" a sentence of death if it concluded that the aggravating circumstances outweigh the mitigating circumstances); Blystone, 494 U.S. at 302 (Pennsylvania statute mandating death if jury finds aggravating circumstances outweigh mitigating circumstances.)

At issue in Walton was the Arizona capital sentencing statute which mandates a sentence of death "if the court finds one or more of the aggravating circumstances enumerated...and that there are no mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 644 (quoting Ariz.Rev.Stat.Ann. §13-703(E)). Holding that Boyde and Blystone precluded Walton's claim, the Court reiterated the holdings of both cases, specifically noting that in Blystone, because the statute at issue there did not preclude the sentencer from considering any type of

mitigating evidence, it was consistent with the 8th Amendment's requirement of individualized sentencing. 497 U.S. at 651-652.

The Arizona statute in Walton does not mandate a death sentence if the sentencing court finds that aggravating and mitigating circumstances are in equal balance. It only mandates a death sentence if the court finds "no mitigating circumstances sufficiently substantial to call for leniency." This language frees the sentencer to decide either way between a death sentence and life imprisonment, regardless of the relative weight given to the aggravating and mitigating circumstances. Thus, under the Arizona statute, the sentencer is free to find that mitigating circumstances are "sufficiently substantial to call for leniency", not only when it finds that the aggravating and mitigating circumstances are in equal balance, but even if it finds that aggravating circumstances outweigh mitigating circumstances. See State v. Valencia, 645 P.2d 239 (Ariz. 1982)(Reversing death sentence, Supreme Court of Arizona stated: "By using the term 'sufficiently substantial,' we believe the legislature intended that the trial court might give unequal weight to the various aggravating and mitigating circumstances when indicated by the facts in each case...We do not believe the legislature intended the court to play a numbers game and automatically apply the death penalty when the number of aggravating circumstances found exceeded the number of mitigating circumstances found, any more than it intended to require life imprisonment when the number of mitigating circumstances found exceeded the number of aggravating circumstances found"); State v. Trostle, 951 P.2d 869, 888 (Ariz. 1997)("There is no scale upon which to measure what is or is not 'sufficiently substantial'...Where 'there is a doubt whether the death sentence should be imposed, we will resolve that doubt in favor of a life sentence'")(quoting Valencia, 645 P.2d at 241)).

The "sufficiently substantial" language in the Arizona statute is thus tantamount to a "saving" instruction requiring the sentencer to make a determination, after weighing aggravating and mitigating circumstances, whether or not death is the appropriate punishment. K.S.A. 21-4624(e) leaves no option to the jury upon finding either that the aggravating and mitigating circumstances are in equal balance or that the aggravating circumstances outweigh the mitigating circumstances – the jury must impose death.[94]

In forcing a jury to impose death when aggravating and mitigating circumstances are in equal balance, or when the jury is unable to decide the balance one way or the other, K.S.A. 21-4624(e) renders death sentences in Kansas unreliable, and creates a presumption of death which shifts the burden to the defendant to prove that he should not be sentenced to death. Consequently, K.S.A. 21-4624(e) is unconstitutional under the 8th and 14th Amendments, and §9 and §18 of the Kansas Bill of Rights. Mr. Kleypas' death sentence must be vacated.

* * *

[94]The district court could have cured the defect in Mr. Kleypas' case by giving any of the defendant's proposed jury instructions requiring the jury to separately determine, after weighing the aggravating and mitigating circumstances, whether death was an appropriate punishment (R. 10, 2246, 2263, 2286, 2287, 2289, 2290, 2291, 2293, 2297, 2298, 2300). It failed to do so. Moreover, the fact remains that K.S.A. 21-4624(e), which contains no savings clause, is unconstitutional for the reasons stated herein.

[Received February 14, 2000]

NO. 98-80920-S

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IN THE
SUPREME COURT OF THE STATE
OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

vs.

GARY W. KLEYPAS
Defendant-Appellant

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# BRIEF OF APPELLEE
# VOLUME II

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APPEAL FROM THE DISTRICT COURT OF
CRAWFORD COUNTY, KANSAS
HONORABLE DONALD NOLAND, JUDGE
DISTRICT COURT CASE NO. 96-CR-240-G

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**Issue XLIV. The Supreme Court of the United States has expressly approved the constitutionality of mandating a death sentence-once the State has proven aggravating circumstances-unless the defendant persuades the sentencer that mitigating circumstances outweigh those circumstances.**

**Standard of Review**

The interpretation of a statute is a question of law wherein review is unlimited. *State v. Donlay*, 253 Kan. 132, 133-34, 853 P.2d 680 (1993).

**Argument and Authorities**

In *Walton v. Arizona*, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court expressly rejected the very argument that defendant makes here: that it is unconstitutional to mandate a death sentence unless the defendant persuades the sentencer that mitigating circumstances outweigh the aggravating circumstances that the State has proven. The defendant in *Walton* made the very same argument, stating Question Presented 2(a) in his brief as whether the Arizona statute violated the Constitution by "requiring that death be imposed if the defendant fails to prove the existence of mitigating circumstances sufficiently substantial to call for leniency."" Brief of Petitioner, *Walton v. Arizona*, No. 88-7351, at i.[13] The defendant further explained the Arizona statutory language as follows: "This statutory language tells an Arizona sentencing judge who

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[13] Merits briefs in Supreme Court cases are available through both Lexis and Westlaw. Lexis, for example, does not assign electronic database citations to briefs, but such documents can be located through a search in the Lexis "Genfed" library, "Briefs" file, using the Supreme Court case number, such as "Number (88-7351)" for *Walton v. Arizona*. For the Court's convenience this brief is included in the Appendix Vol. II, pp. 21-118.

finds even a single aggravating factor, that death must be imposed unless-as the Arizona Supreme Court put it in Petitioner's case-there are 'outweighing mitigating factors.'" *Id.* at 33.

The Court expressly addressed and rejected the defendant's argument. Justice White, writing for four Justices, declared that "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 650, 110 S.Ct. at 3055. Justice White went on to reject any notion that the Arizona statute, which is functionally indistinguishable from the Kansas statute in this respect, created an unconstitutional presumption in favor of death sentences. *Walton*, 497 U.S. at 651-52, 110 S. Ct. at 3056. Justice White was writing for four Justices rather than the Court only because Justice Scalia, who concurred in the judgment on these issues, would have endorsed *mandatory* death sentences in all circumstances. See *Walton*, 497 U.S. at 661-67, 110 S.Ct. at 3061-64 (Scalia, J., concurring in part and concurring in the judgment); *Campbell v. Wood*, 18 F.3d 662, 675 n.5 (9th Cir. 1994) (discussing the Justices' votes in *Walton*).

Thus, a majority of the Court expressly rejected the very claim defendant (and his amicus, the Cornell Death Penalty Project) is now raising. *See also Walton*, 497 U.S. 497 U.S. at 686-90, 110 S. Ct. at 3075-76 (Blackmun, J., dissenting) (recognizing that the Court had rejected the argument that the Arizona statute established an unconstitutional presumption of death). State courts and lower federal courts also have rejected such claims. *See, e.g., People v. Mitchell*, 152 Ill.2d 274, 346, 604 N.E.2d 877, 912 (1992) (relying on *Walton* in rejecting argument that Illinois statute creates an

unconstitutional presumption in favor of a death sentence; citing other cases to same effect).

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[Received May 1, 2000]

No. 98-80920-S

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IN THE
SUPREME COURT OF THE STATE
OF KANSAS

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STATE OF KANSAS
Plaintiff-Appellee

vs.

GARY W. KLEYPAS
Defendant-Appellant

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# REPLY BRIEF OF APPELLANT

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Appeal from the District Court of Crawfprd County,
Kansas
Honorable Donald Noland, Judge
District Court Case No. 96 CR 240G

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* * *

**Issue XLIV: K.S.A. 21-4624(e) is unconstitutional in violation of the 8th and 14th Amendments to the United States Constitution and § 9 and § 18 of the Kansas Bill of Rights, because it mandates a death sentence even if the jury is unable to decide whether aggravating circumstances outweigh mitigating circumstances; the statute created a presumption of death and shifts the burden of proof to the defendant to prevent a death sentence.**

In response to this argument, the state relies entirely on Walton v. Arizona, 497 U.S. 639, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990) to suggest that in that case "the United States Supreme Court rejected the very argument that defendant makes here: that it is unconstitutional to mandate a death sentence unless the defendant persuades the sentencer that mitigating circumstances outweigh the aggravating circumstances that the State has proven" (Brief of Appellee, at 239). The state not only refuses to acknowledge the distinct statutory language of the Arizona statute at issue in Walton, bit it simply misreads what was actually decided by the Court in that case.

The relevant issue in Walton concerned only the question which the Court expressly reserved opinion on in Lockett v. Ohio, 438 U.S. 586, 609, 57 L.Ed.2d 973, 98 S.Ct. 2954 (1978), i.e., "'whether it violates the Constitution to require defendants to bear the risk of nonpersuasion as to the existence of mitigating circumstances in capital cases.'" Walton, 497 U.S., at 650. The Court in Walton answered that question in the negative, holding that the burden of proving the existence of mitigating circumstances could be placed on the defendant without violating the Constitution. Id. The holding in Walton goes no further, yet the state in this case seeks to extend that holding far beyond its

parameters. It is one thing to place the burden of proving the existence of mitigating circumstances on the defendant, which Walton permits; it is quite another to place the burden on the defendant to disprove that he should be sentenced to death, which K.S.A. 21-4624(e) does by requiring a death sentence unless the aggravating circumstances are "not outweighed by any mitigating circumstances which are found to exist."

Unlike the Arizona statute at issue in Walton, which states that a court shall impose a death sentence if the court finds one or more aggravating circumstances and "that there are no mitigating circumstances sufficiently substantial to call for leniency," and which the Court found did not create an unconstitutional presumption of death (497 U.S., at 644, 651-652), the Kansas statute, K.S.A. 21-4624(e), clearly creates a presumption of death because it requires a death sentence even if the aggravating and mitigating circumstances are in equal balance, i.e., a death sentence must be imposed despite reasonable doubt that it is an appropriate sentence. See State v. Biegenwald, 524 A.2d 130, 154 (N.J. 1987) ("a determination of death despite reasonable doubt as to its justness would be unthinkable").

As is discussed in the Brief of Appellant, the distinct language of the Arizona statute at issue in Walton does not create a presumption of death because it only requires a death sentence if the court finds "no mitigating circumstances sufficiently substantial to call for leniency," language which frees the sentencer to decide between a death sentence and life imprisonment regardless of the relative weight given to the aggravating and mitigating circumstances. Thus, the sentencer can find that mitigating circumstances are "sufficiently substantial to call for leniency" and impose life imprisonment even if the mitigating circumstances do not outweigh the aggravating circumstances, or indeed, even if the aggravating

circumstances outweigh the mitigating circumstances.[10] See Brief of Appellant, at 512-514. Indeed, statutes in Washington and Illinois employing language substantially similar to that in the Arizona statute have been interpreted as creating a "presumption of leniency" (see Campbell v. Kincheloe, 829 F.2d 1453, 1465-1466 (9th Cir. 1987), holding that Washington death penalty statute, requiring jury to determine whether there are "sufficient circumstances to merit leniency," creates a presumption of leniency which continues throughout the entire proceeding unless it has been overcome by proof beyond a reasonable doubt by the state; Campbell v. Wood, 18 F.3d 662. 674-675 (9th Cir. 1994) (same)), or as allowing imposition of a death sentence only after the sentencer determines that the aggravating circumstances outweigh the mitigating circumstances (see Silagy v. Peters, 905 F.2d 986, 1000 (7th Cir. 1990)

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[10] In State v. Spain, 2000 WL 426381 (Kan. 2000), this Court held that the imposition of a hard 40 sentence where the district court finds the aggravating circumstances are not outweighed by mitigating circumstances does not constitute cruel or unusual punishment under § 9 of the Kansas Constitution Bill of Rights or the 8th Amendment to the United States Constitution. As this Court has clearly separated the law governing hard 40 cases and the law governing death penalty cases (Spain, 2000 WL 426381, *5), the holding in Spain has no application to this case. This Court's decision in Spain is notable in one respect: Discussing Walton, this Court noted that the majority in Walton found that the Arizona statute does not create an unconstitutional presumption of death. The appellant agrees that the Arizona statute does not create a presumption of death, because as explained herein and in the Brief of Appellant, under the Arizona statute a court can impose life imprisonment regardless of the relative weight of the aggravating and mitigating circumstances. Walton thus stands for the proposition that any capital sentencing statute that creates a presumption of death is unconstitutional. The Arizona statute survived scrutiny because it did not create such a presumption. In contrast, the Kansas statute does create a presumption of death by requiring a death sentence even if the aggravating and mitigating circumstances are in equal balance, which is unconstitutional.

(interpreting Illinois statute requiring death if mitigation is not "sufficient to preclude" the death penalty)).[11]

In contrast, every court that has considered the type of weighing equation set forth in K.S.A. 21-4624(e), mandating a death sentence if the aggravating circumstances are not outweighed by the mitigating circumstances, has struck down the statute as unconstitutional in violation of due process and/or prohibitions against cruel and unusual punishment. See Brief of Appellant, at 507-511 (discussing State v. Biegenwald, 524 A.2d 130; People v. Young, 814 P.2d 834 (Colo. 1991); Hulsey v. Sargent, 868 F.Supp. 1090 (E.D. Ark. 1993)).[12] The state does not discuss, indeed, does not even acknowledge these cases in its brief, even though those cases are on all fours with this case in terms of the unconstitutionality of K.S.A. 21-4624(e).

For the reasons stated herein and in the Brief of Appellant, K.S.A. 21-4624(e) is unconstitutional under the 8th and 14th

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[11] Silagy v. Peters is cited in People v. Mitchell, 604 N.E.2d 877, 912 (Ill. 1992), a case relied on by the state in its argument. See Brief of Appellee, at 241. Given that Silagy makes clear that statutes similar to those at issue in Walton are substantially different than K.S.A. 21-4624(e), the state's reliance on these cases as support for its position is grossly misplaced.

[12] Discussing the constitutionally requisite eligibility and selection stages of the decision-making process at the penalty phase (see Tuilaepa v. California, 512 U.S. 967, 971, 129 L.Ed.2d 750, 114 S.Ct. 2630 (1994)), the Colorado Supreme Court in People v. Dunlap, 975 P.2d 723 (Colo. 1999) concluded that in a weighing state, the eligibility stage extends through the weighing process, and the selection stage occurs in the context of the "saving" clause, when the jury makes its final decision, after weighing aggravating and mitigating circumstances, about whether the defendant should be sentenced to life imprisonment or death. 975 P.2d, at 739. If the selection stage occurs at the point where the jury deliberates pursuant to the "saving" clause, the absence of such clause from K.S.A. 21-4624(e) means that our statute omits the selection stage from the deliberative process at the penalty phase, a further structural defect in the statute which renders it unconstitutional under the 8th and 14th Amendments.

Amendments, and § 9 and § 18 of the Kansas Bill of Rights, and Mr. Kleypas' death sentence must be vacated.

* * *

[Received December 22, 1999]

No. 98-80920-S

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In the
SUPREME COURT
OF THE STATE OF KANSAS

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State of Kansas, *Plaintiff-Appellee*

*vs.*

Gary W. Kleypas, *Defendant-Appellant*

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# Brief of the Cornell Death Penalty Project as Amicus Curiae in Support of Appellant

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Appeal from The District Court of
Crawford County, Honorable Donald R.
Noland, Judge, District Court Case No. 96CR240G

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**In the**
**SUPREME COURT**
**OF THE STATE OF KANSAS**

---

Gary W. Kleypas, *Appellant*

*v.*

State of Kansas, *Appellee*.

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Appeal from The District Court of
Crawford County, Honorable Donald R.
Noland, Judge, District Court Case No. 96CR240G

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## INTEREST OF *AMICUS CURIAE*

The Cornell Death Penalty Project is an undertaking of the Cornell Law School. One of the Project's primary goals is to address questions of law that carry important implications beyond the facts of any particular case and that involve the basic fairness of the death penalty's administration. Moreover, the Project's approach to these questions is informed to the greatest extent possible by reliance on empirical studies of the capital sentencing process. In addition, the Project itself engages in advanced empirical analysis of juror decision making in capital cases. The Project accordingly seeks to intervene as *amicus curiae* in selected cases presenting such important questions of law.

## CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

This case involves the Eighth Amendment to the Constitution of the United States, which provides in relevant part:

[N]or [shall] cruel and unusual punishments be inflicted;

This case also involves the Fourteenth Amendment to the Constitution of the United States, which provides in relevant part:

> [N]or shall any state deprive any person of life, liberty, or property without due process of law;

This case also involves Kansas Statutes Annotated § 21-4624(e), which provides in relevant part:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. § 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death . . ..

## STATEMENT

Appellant Gary W. Kleypas was convicted of capital murder and sentenced to death in the District Court of Crawford County. The sentencing jury was instructed that it must impose death if it found that aggravating circumstances were not outweighed by mitigating circumstances.

## SUMMARY OF ARGUMENT

Because the Kansas death-penalty statute requires a capital sentencing jury to impose death when the jury does not decide that the nature of the crime and the characteristics of the offender warrant the imposition of the death penalty, it is both fundamentally unfair and unconstitutional, in violation of the English and Fourteenth Amendments to the United States Constitution.

## ARGUMENT

**Section 21-4624(e) of the Kansas capital sentencing statute violates the Eighth and Fourteenth Amendments to the United States Constitution because it requires the jury to impose death when its members**

**do not decide that death is the appropriate punishment.**

A.

According to § 21-4624(e) of the Kansas capital sentencing statute, the jury must impose a death sentence if it finds beyond a reasonable doubt that at least one aggravating circumstance exists, and "that the existence of such aggravating circumstances [i.e., all aggravating circumstances proven beyond a reasonable doubt] is *not outweighed by* any mitigating circumstances which are found to exist; otherwise, the defendant shall be sentenced as provided by law." (emphasis added)

Section 21-4624(e) thus requires the jury to return a death sentence when statutory aggravating circumstances outweigh mitigating circumstances, *or* when aggravating circumstances and mitigating circumstances are in equipoise. In other words, § 21-4624(e) requires the jury to return a death sentence not only when it decides that aggravating circumstances outweigh mitigating circumstances, but also when it does not decide one way or another whether aggravating circumstances outweigh mitigating circumstances. Section 21-4624(e) therefore allocates to the defendant the risk of nonpersuasion with respect to whether or not he should be sentenced to death. *Cf. State v. Biegenwald*, 106 N.J. 13, 60-61, 524 A.2d 130, 155 (1987) (giving this construction to the same language in former version of New Jersey's capital sentencing scheme).

The unfairness and unconstitutionality of § 21-4624(e)'s sentencing formula is self-evident once it becomes clear exactly what that formula requires. It cannot be consistent with fundamental fairness to require a capital defendant to bear the risk of a death sentence when the jury does not decide that such a sentence is warranted.

Some capital sentencing schemes require the jury to impose death when the jury decides that the nature of the

crime and the character of the offender is more "aggravated" than "mitigated." In essence, such statutes send the message that the law has no place for mercy. They demand that the death penalty be imposed if the jury finds that the defendant deserves it, which is another way of saying if the jury finds that aggravating circumstances outweigh mitigating circumstances.

Such schemes may be constitutionally and morally unobjectionable. Mercy, one may reasonably think, is the province of the governor, constitutionally and morally. Yet Kansas' capital sentencing scheme goes further. It requires a capital jury to return a death sentence not only when it decides that the defendant deserves death (and so precludes it from being merciful), but also when it does not decide that death is the deserved punishment.

The law's moral judgment should be especially reliable, clear, and unequivocal when it exercises its most profound condemnation. *See Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976) (plurality opinion) ("Because [death is qualitatively different from a sentence of life imprisonment], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); *see also Lankford v. Idaho*, 500 U.S. 110, 125, 111 S.Ct. 1723, 1732, 114 L.Ed.2d 173, 187 (1991) (noting "emphasi[s on] the special importance of fair procedure in the capital sentencing context"); *cf.* In re *Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1072-73, 25 L.Ed.2d 368, 375 (1970) ("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned.").

But § 21-4624(e) makes judgments of death in Kansas unreliable, unclear, and replete with equivocation. No one can say for sure that a defendant sentenced to death in

accordance with § 21-4624(e) deserved the punishment he received. Moreover, this result simply cannot be reconciled with the Eighth Amendment's demand for heightened reliability in capital sentencing. A death sentence imposed pursuant to § 21-4624(e) cannot with any confidence be said to reflect the jury's "reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S. Ct. 2934, 2947, 106 L.Ed.2d 256, 279 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring) (emphasis in original)). Instead, it will often represent nothing more than the operation of a presumption in favor of death.

In addition, § 21-4624(e) turns the law's ordinary and sensible priorities upside down. As a matter of due process, the procedural protections the law provides a citizen faced with a state-imposed deprivation usually depends on the strength of the individual interest at stake. The stronger the interest, the greater the protections. *See, e.g., Winship*, 397 U.S. at 363-64, 90 S. Ct. at 1072, 25 L.Ed.2d at 375; *see also Addington v. Texas*, 441 U.S. 418, 423, 99 S. Ct. 1804, 1808, 60 L.Ed.2d 323, 329 (1979) ("The standard [of proof] serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision."). *See generally* Linda E. Carter, *A Beyond A Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 OHIO ST. L.J. 195, 217-21 (1991); Beth S. Brinkmann, Note, *The Presumption of Life: A Starting Point for a Due Process Analysis of Capital Sentencing*, 94 YALE L.J. 351, 370-71 (1984).

For example, when the state wishes to terminate a parent's rights over his or her children on grounds of "unfitness," the risk of nonpersuasion rests with the state. *See e.g.*, In re *S.M.Q.*, 247 Kan. 231, 233, 796 P.2d 543, 545 (1990); *cf. Santosky v. Kramer*, 455 U.S. 745, 769-70, 102 S. Ct. 1388, 1403, 71 L.Ed.2d 599, 617 (1982) (holding that Due Process

minimally requires states to prove by clear and convincing evidence factual allegations necessary to terminate parental rights). But § 21-4624(e) says that when the state wishes to take a defendant's *life*, not just his kids, the risk of nonpersuasion rests with the *defendant*, not with the state. Section 21-4624(e) thus gives a unique twist to the longstanding idea that "death is different." Far from getting additional safeguards, death gets fewer. This twist is macabre -- it also violates Due Process.

Moreover, the real-world effect of § 21-4624(e)'s presumption in favor of death is actually stronger than it first appears. Empirical studies of capital sentencing juries in other states show that jurors typically enter the penalty phase proceedings already thinking that death is the appropriate sentence, even where the applicable state law creates no such presumption. *See, e.g.*, Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L.REV. 1, 12 (1993) ("The data suggest that the sentencing phase of a capital trial [in South Carolina] commences with a substantial bias in favor of death."); James Luginbuhl & Jule Howe, *Discretion in Capital Sentencing: Guided or Misguided?*, 70 IND. L.J. 1161, 1177 (1995) ("[E]ven before hearing the instructions [North Carolina jurors are] . . . predisposed toward a verdict of death.");[5] Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L.REV. 1, 31-33 (reporting that Illinois jurors incorrectly believe that Illinois law creates a presumption in favor of death).

*Amicus* can think of no persuasive reason to believe that the capital sentencing process works any differently in

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[5] Both of these studies are part of the on-going analysis of the Capital Jury Project, a multistate research effort funded in part by the National Science Foundation. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995) (providing overview of Project and reporting initial findings).

Kansas than it does in states where that process has actually been empirically studied. If so, then § 21-4624(e) adds insult to injury: It adds a *de jure* presumption of death *on top of* an already existing *de facto* presumption of death, stacking the deck even higher in favor of death.

Finally, § 21-4624(e)'s patent unfairness makes it unique among capital sentencing schemes, adding yet another constitutional strike against it. The Eighth Amendment's ban against cruel and unusual punishments "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101, 78 S. Ct. 590, 598, 2 L.Ed.2d 630, 642(1958) (plurality opinion). In order to determine the content of those contemporary standards, the courts look primarily to the enactments of state legislatures. *See, e.g., Stanford v. Kentucky*, 492 U.S. 361, 370, 109 S. Ct. 2969, 2975, 106 L.Ed.2d 306, 318 (1989). *Amicus* have examined the sentencing formulas contained in the capital sentencing statutes of each of the thirty-seven states in addition to Kansas that currently authorize capital punishment. That examination reveals that Kansas alone unequivocally requires the jury to impose a death sentence when aggravating and mitigating circumstances are in equipoise. *See* Statutory Appendix, *infra* at. pp. 16-19.

B.

Indeed, several courts have recognized that forcing a capital sentencing jury to impose death when aggravating and mitigating circumstances are equally balanced, as does § 21-4624(e), is fundamentally unfair.

In *People v. Young*, 814 P.2d 834 (Colo. 1991) (en banc), the Colorado Supreme Court held that the recently amended Colorado death-penalty law, which required the jury to impose death if aggravating and mitigating factors were in equipoise, violated the Colorado Constitution's prohibition against cruel and unusual punishments, as well as the

requirements of due process. *See id.* at 845. "A jury determination that such factors are in equipoise," said the Court, "means nothing more or less than that the moral evaluation of the defendant's character and crime expressed as a process of weighing has yielded inconclusive results." *Id.* A death sentence imposed under such circumstances carried no constitutionally adequate guarantee that death was in fact the appropriate sentence. *See id.*[6]

Likewise, in *State v. Biegenwald*, 106 N.J. 13, 57, 524 A.2d 130, 152 (1987), the "clear conclusion from [the trial court's] statement that aggravating factors must be outweighed in order for a sentence of life imprisonment to be imposed was that if aggravating and mitigating factors were of equal weight, the penalty would be death." This instruction, the New Jersey Supreme Court held, was fundamentally unfair. *See id.* at 62, 524 A.2d at 156. "If anywhere in the criminal law a defendant is entitled to the benefit of the doubt," wrote the Court, "it is here." *Id.* But the New Jersey statute and the instruction based upon it denied the defendant that benefit. Consequently, the Court held that fundamental fairness required the jury to find "that aggravating factors *outweigh* mitigating factors, and this balance must be found beyond a reasonable doubt." *Id.*

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[6] A prior Colorado death-penalty statute, which the Colorado Supreme Court had upheld, required the jury to sentence the defendant to death if the jury determined that mitigating circumstances did not outweigh aggravating circumstances *but only if* the jury further determined that death was in fact the "appropriate punishment beyond a reasonable doubt." *See Young*, 814 P.2d at 840 (quoting *People v. Tenneson*, 788 P.2d 786, 796 (Colo. 1990)). *See also Smith v. Armontrout*, 888 F.2d 530, 544-45 (8th Cir. 1989) (upholding a presumption of death-type instruction in a Missouri jury charge where the charge included a similar "saving" instruction); *Gray v. Lucas*, 677 F.2d 1086, 1106 (5th Cir. 1982) (upholding presumption of death-type language in a Mississippi statute where the jury remained free to impose life imprisonment even if it found that aggravating and mitigating circumstances were evenly balanced).

Federal law also prohibits forcing a jury to impose death when aggravating and mitigating circumstances are evenly balanced. In *Jackson v. Dugger*, 837 F.2d 1469, 1473-74 (11th Cir. 1988), for example, the Eleventh Circuit held unconstitutional an instruction given to a Florida capital-sentencing jury that required the jury to presume that death was the appropriate sentence.[7] Likewise, in *Hulsey v. Sargent*, 868 F. Supp. 1090, 1103 (E.D. Ark. 1993), the District Court for the Eastern District of Arkansas held unconstitutional the then-applicable Arkansas statute because it, like § 21-4624(e), required the jury to impose death if mitigating circumstances did not outweigh aggravating ones.[8]

C.

The United States Supreme Court has considered and upheld sentencing formulas superficially similar to, but in fact very different from, § 21-4624(e). *See Walton v. Arizona*, 497 U.S. 639, 110 S. Ct. 3047, 111 L.Ed.2d 511 (1990); *Boyde v. California*, 494 U.S. 370, 110 S. Ct. 1190, 108 L.Ed.2d 316 (1990); *Blystone v. Pennsylvania*, 494 U.S.

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[7] The instruction read: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided." *Jackson*, 837 F.2d at 1473. *But cf. Jones v. Dugger*, 928 F.2d 1020, 1029 (11th Cir. 1991) (upholding under *Walton v. Arizona*, 497 U.S. 639 (1990), an instruction that "shifted to the defendant the burden to prove that mitigating factors outweighed aggravating factors"). Insofar as *Jones* reads *Walton* as endorsing the practice of forcing the jury to impose death when aggravating and mitigating circumstances are evenly balanced, amicus respectfully submits that the *Jones* panel misread *Walton*. *See infra* at pp. 12-14 (discussing *Walton*).

[8] Arkansas subsequently amended its capital sentencing to eliminate the presumption of death. *See* Ark. Code Ann. § 5-4-603(b) (Michie 1987 & Supp. 1997) (requiring the jury to impose life imprisonment if "[a]ggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist").

299, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990). The difference is that none of the statutory provisions involved in those cases forced the jury to impose death when aggravating and mitigating circumstances were evenly balanced, as does § 21-4624(e).

In *Blystone* and *Boyde* the statutory provisions in question only required the jury to impose death when aggravating circumstances outweighed mitigating circumstances.[9] Neither provision required the jury to impose a death sentence if it could not make up its mind as to the relative balance of aggravation and mitigation. In other words, neither required death if aggravating and mitigating circumstances were in equipoise, as does § 21-4624(e).

In *Walton*, the Supreme Court examined Arizona's capital sentencing statute, which required the sentencer to "impose a sentence of death if [it] finds one or more of the [enumerated] aggravating circumstance . . . *and* there are no mitigating circumstances sufficiently substantial to call for leniency." *Walton*, 497 U.S. at 644, 110 S. Ct. at 3052, 111 L.Ed.2d at 522 (quoting Ariz. Rev. Stat. Ann. § 13-703(E)) (emphasis added).

The Ninth Circuit had earlier held that this language created an unconstitutional "presumption of death." *See Adamson v. Ricketts*, 865 F.2d 1011, 1042 (9th Cir. 1988) (en banc). The Supreme Court disagreed, upholding the

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[9] The Pennsylvania statute considered in *Blystone* required the jury to impose death "if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances." *Blystone*, 494 U.S. at 302 (quoting 42 Pa. Cons. Stat. § 9711 (C)(1)(iv)).

The California instruction considered in *Boyde* required the jury to impose death "[i]f [it] conclude[d] that the aggravating circumstances outweigh[ed] the mitigating circumstances." *Boyde*, 494 U.S. at 374 (citing 1 California Jury Instructions 8.84.2, Criminal (4th ed. 1979)).

provision under *Blystone* and *Boyde*. *See Walton*, 497 U.S. at 651-52, 110 S. Ct. at 3056, 111 L.Ed.2d at 527.

*Walton*, however, is ambiguous. It might mean that a "presumption of death" is not unconstitutional. Or it might simply mean that the Arizona statute did not in fact create such a presumption in the first place. The latter reading of *Walton* is the better one, because the better reading of the Arizona statute itself is that it, unlike § 21-4624(e), does not force the sentencer to return a death sentence when aggravating and mitigating circumstances are evenly balanced.[10]

On its face, the Arizona provision operates on a different logic than does §21-4624(e). Unlike §21-4624(e), the Arizona statute does *not* tell the sentencer to impose death if aggravating circumstances are not outweighed by mitigating circumstances. Instead, it requires death only if "there are no mitigating circumstances sufficiently substantial to call for leniency." The key to the Arizona sentencing formula is the idea of "sufficiently substantial."

That language, unlike §21-4624(e), does not direct the sentencer to impose death if it finds aggravating and

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[10] Statutes in Washington and Illinois, which are similar to the Arizona statute, have been read as not creating a "presumption of death." *See, e.g., Campbell v. Kincheloe*, 829 F.2d 1453, 1466 (9th Cir. 1987) (construing Washington statute as creating a "presumption of leniency"); *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990) ("[A] sentence of death is imposed in Illinois only after the sentencing authority determines that the aggravating circumstances outweigh the mitigating circumstances in the particular crime."); *People v. Bean*, 137 Ill.2d 65, 140, 560 N.E.2d 258, 292 (1990) ("[W]e hold that the [Illinois] death penalty statute does not unconstitutionally create a presumption that death is the appropriate penalty."). Moreover, it bears emphasizing that the Ninth Circuit in *Adamson* and the dissent in *Walton*, which both expressly read the Arizona statute as creating a "presumption of death," concluded that such a presumption was unconstitutional. *See Walton*, 497 U.S. at 686, 110 S. Ct. at 3075, 111 L.Ed.2d at 550 (Blackmun, J., dissenting); *Adamson*, 865 F.2d at 1044.

mitigating circumstances are in equipoise. If a sentencer in Arizona thought aggravating and mitigating circumstances were equally balanced, he or she could reasonably conclude that there were mitigating circumstances "sufficiently substantial to call for leniency," *or* he or she could reach the opposite conclusion. The law leaves the sentencer free to decide either way. In contrast, a Kansas juror who reached the same conclusion about the relative balance between aggravation and mitigation would have only one option: to impose death. In fact, under the Arizona scheme a sentencer who thought that aggravating circumstances actually *outweighed* mitigating circumstances could *still* conclude that the available mitigating circumstances were "sufficiently substantial"-- i.e., that they crossed some critical threshold of substantiality -- to "call for leniency." A Kansas juror clearly does not have that option.

A state has leeway to decide how to structure its capital sentencing scheme. It's under no obligation, for example, to specify or allocate burdens of proof or risks of nonpersuasion at the penalty phase. As long as the defendant has had a full opportunity to present evidence in mitigation, a state can, if it so chooses, leave the jury to decide for itself what to do if aggravation and mitigation are in equipoise. On the other hand, if a state *does* choose to allocate burdens in the penalty phase, it cannot do so in a way that forces the jury to impose death when it has not decided that the defendant deserves death.

## CONCLUSION

For the reasons advanced above, *amicus* respectfully request the Court to declare Kansas Statutes Annotated § 21-4624(e) unconstitutional.

Respectfully submitted,

/s/ Stephen P. Garvey

DATED: April 6, 1999

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## STATUTORY APPENDIX
(current through 1997 supplements)

| *State* | *Statutory Provision* | *Relevant Statutory Language* |
|---|---|---|
| Alabama | Ala. Code § 13A-5-46(e)(2) | "If the jury determines that one or more aggravating circumstances ... exist but do not outweigh the mitigating circumstances, it shall return an advisory verdict recommending to the trial court that the penalty be life imprisonment without parole." |
| Arizona | Ariz. Rev. Stat. § 13-703(E) | Court "shall impose a death sentence if the court finds one or more aggravating circumstances ... and that there are no mitigating circumstances sufficiently substantial to call for leniency." |
| Arkansas | Ark. Code Ann. § 5-4-603(b) | Jury shall impose life imprisonment if "[a]ggravating circumstances do not outweigh beyond a reasonable doubt all mitigating circumstances found to exist." |
| California | Cal. Penal Code § 190.3 | Trier of fact "shall impose a sentence of death if [it] ... concludes that the aggravating circumstances outweigh the mitigating circumstances," and shall impose "a sentence of confinement in state prison for a term of life without the possibility of parole" if it "determines that the mitigating circumstances outweigh the aggravating circumstances." |

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| Colorado | Colo. Rev. Stat. § 16-11-103(2)(b) | Sentencing authority "shall not impose a death sentence unless it unanimously finds ... [t]here are insufficient mitigating factors to outweigh the aggravating factor or factors that were proved." |
| Connecticut | Conn. Gen. Stat. § 53a-46a(g) | Court "shall impose a sentence of life imprisonment without the possibility of parole" if the trier of fact finds that the aggravating factors "do not outweigh the one or more mitigating factors." |
| Delaware | Del. Code Ann. tit. 11, § 4209(d) | "A sentence of death shall be imposed . . . if the Court finds ... that the aggravating circumstances ... outweigh the mitigating circumstances. Otherwise, the Court shall impose a sentence of imprisonment for the remainder of the defendant's natural life ...." |
| Florida | Fla. Stat. Ann. § 921.141(3) | "[I]f the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the fact[]:... [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." |
| Georgia | Ga. Code Ann. § 17-10-31 | Georgia is a "threshold" state. It specifies no sentencing formula beyond the constitutional requirement of a finding of at least one statutory aggravating circumstance. |

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| Idaho | Idaho Code § 19-2515(c) | "[T]he court shall sentence the defendant to death unless the court finds that mitigating circumstances ... are sufficiently compelling that the death penalty would be unjust." |
| Illinois | 720 111. Comp. Stat. 5/9-1(g) | "If the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death penalty, the court shall sentence the defendant to death." |
| Indiana | Ind. Code § 35-50-2-9(k) | "Before a [death] sentence may be imposed ... [the trier of fact] must find that:... any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." |
| Kentucky | Ky. Rev. Stat. Ann. § 532.025(3) | Kentucky is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance. |
| Louisiana | La. Rev. Stat. Ann. § 905.3 | Louisiana is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance. |

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| Maryland | Md. Ann. Code art. 27, § 413(h) | "If [the court or jury] finds that the aggravating circumstances outweigh the mitigating circumstances, the sentence shall be death.... If [the court or jury] finds that the aggravating circumstances do not outweigh the mitigating circumstances, a sentence of death may not be imposed." |
| Mississippi | Miss. Code Ann. § 99-19-101(3) | "For the jury to impose a sentence of death, it must unanimously find in writing the following:... [t]hat there are insufficient mitigating circumstances . . . to outweigh the aggravating circumstances." |
| Missouri | Mo. Rev. Stat. § 565.030(4) | "The trier shall assess and declare the punishment at life imprisonment ...: [i]f the trier does not find that the evidence in aggravation of punishment ... warrants imposing the death penalty; or [i]f the trier concludes that there is evidence in mitigation of punishment ... sufficient to outweigh the evidence in aggravation of punishment ...; or [i]f the trier decides under all the circumstances not to assess and declare the punishment at death." |
| Montana | Mont. Code Ann. § 46-18-305 | "[T]he court ... shall impose a sentence of death if it ... finds that there are no mitigating circumstances sufficiently substantial to call for leniency." |

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| Nebraska | Neb. Rev. Stat. § 29-2522 | "[T]he judge or judges shall fix the sentence at either death or life imprisonment, but such determination shall be based upon the following considerations: (1) Whether sufficient aggravating circumstances exists to justify the imposition of a sentence of death; (2) Whether sufficient mitigating circumstances exists which approach or exceed the weight given to the aggravating circumstances; or (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases...." |
| Nevada | Nev. Rev. Stat. § 200.030(4)(a) | "A person convicted of murder in the first degree ... shall be punished: (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found to exist do not outweigh the mitigating circumstances; or (b) By imprisonment in the state prison[] ...." |
| New Hampshire | N.H. Rev. Stat. § 630:5(IV) | "[I]f the jury concludes that the aggravating factors outweigh the mitigating factors or that the aggravating factors, in the absence of any mitigating factors, are themselves sufficient to justify a death sentence, the jury ... may recommend that a sentence of death be imposed .... The jury ... is never required to impose a death sentence and the jury shall be so instructed." |

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| New Mexico | N.M Stat. Ann. 31-20A-2(B) | New Mexico is a threshold state. It specifies no sentencing formula. |
| New York | N.Y. Crim. Proc. Law § 400.27(1 1)(a) | "The jury may not direct the imposition of a sentence of death unless it unanimously fnds beyond a reasonable doubt that the aggravating factor or factors substantially outweigh the mitigating factors or factors established, if any, and unanimously determines that the penalty of death should be imposed." |
| North Carolina | N.C. Gen. Stat. § 15A-2000(b) | "[T]he jury shall deliberate and render a sentence recommendation to the court, based upon the following matters: (1) Whether any sufficient aggravating circumstance or circumstances … exist; (2) Whether any sufficient mitigating circumstance or circumstances ... exist; and (3) Based on these considerations, whether the defendant should be sentenced to death or to imprisonment in the State's prison for life." |
| New Jersey | N.J. Stat. Ann. § 2C: 11-3 (c)(3)(b) | "If the jury or the court finds that no aggravating factors exists, or that all of the aggravating factors which exist do not outweigh all of the mitigating factors, the court shall sentence the defendant ... [to imprisonment]." |

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| Ohio | Ohio Rev. Code Ann. § 2929.03(D)(2) | "If the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances ... outweigh the mitigating factors, the trial jury shall recommend to the court that the sentence of death be imposed on the offender. Absent such a finding, the jury shall recommend that the offender be sentenced to [a term of imprisonment]." |
| Oklahoma | Okla. Stat. tit. 21, § 701.11 | "Unless at least one of the statutory aggravating circumstances ... is so found or if it is found that any such aggravating circumstances is outweighed by the finding of one or more mitigating circumstances, the death penalty shall not be imposed." |
| Oregon | Or. Rev. Stat. § 163.150(1)(b), (f) | "Upon conclusion of the presentation of the evidence, the court shall submit the following [four] issues to the jury[, one of which is:] ... (D) Whether the defendant should receive a death sentence.... If the jury returns an affirmative finding on each [of these four] issue[s including (D)] ... the trial judge shall sentence the defendant to death." |
| Pennsylvania | 42 Pa. Cons. Stat. § 9711(C)(1)(iv) | "[T]he verdict must be a sentence of death ... if the jury unanimously finds one or more aggravating circumstances which outweigh any mitigating circumstances. The verdict must be a sentence of life imprisonment in all other cases." |

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| South Carolina | S.C. Code Ann. § 16-3-20(C) | South Carolina is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance. |
| South Dakota | S.D. Codified Laws § 23A-27A-4 | South Dakota is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance. |
| Tennessee | Tenn. Code Ann. § 39-13-204(f)(2) | "If the jury unanimously determines ... that such [aggravating] circumstance or circumstances have not been proven beyond a reasonable doubt to outweigh any mitigating circumstances, the jury shall, in its considered discretion, sentence the defendant either to imprisonment for life without possibility of parole or imprisonment for life." |

| | | |
|---|---|---|
| Texas | Tex. Crim. Pro. Code Ann. § 37.071(e), (g) | "The court shall instruct the jury that ... [if it answer two other questions "yes"], it shall answer the following question: Whether, taking into consideration all the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.... If the jury returns an affirmative finding on each ... [of the first two questions] and a negative finding ... [on the preceding question], the court shall sentence the defendant to death." |
| Utah | Utah Code Ann. § 76-3-207(4) | "The death penalty shall only be imposed if, after considering the totality of the aggravating and mitigating circumstances, the jury finds beyond a reasonable doubt that the total aggravation outweighs total mitigation, and is further persuaded, beyond a reasonable doubt, that the imposition of the death penalty is justified and appropriate in the circumstances." |
| Virginia | Va. Code Ann. § 19.2-264.2 | "[A] sentence of death shall not be imposed unless the court or jury shall ... recommend that the penalty of death be imposed." |
| Washington | Wash. Rev. Code § 10.95.030(2) | "If ... the trier of fact finds that there are sufficient mitigating circumstances to merit leniency, the sentence shall be death." |

| | | |
|---|---|---|
| Wyoming | Wyo. Stat. Ann. § 6-2-102(e) | Wyoming is a threshold state. It specifies no sentencing formula beyond the constitutional requirement of finding at least one statutory aggravating circumstance. |

[Granted May 31, 2005]

**IN THE SUPREME COURT OF THE UNITED STATES**

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[Caption Omitted in Printing]

The motion of respondent for leave to proceed *in forma pauperis* is granted. The petition for a writ of certiorari is granted. In addition to the Question presented by the petition, the parties are directed to brief and argue the following Questions: "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. Sec. 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?"; "Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?"

(6)

Supreme Court, U.S.
FILED
AUG 15 2005
OFFICE OF THE CLERK

No. 04-1170

IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

v.

MICHAEL LEE MARSH, II,

*Respondent.*

**On Writ of Certiorari**
**to the Supreme Court of the State of Kansas**

## BRIEF FOR PETITIONER

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**CAPITAL CASE**

**QUESTIONS PRESENTED**

1. Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?

2. Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

3. Does it violate the Constitution for a state capital-sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

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## OPINION BELOW

The opinion of the Kansas Supreme Court (Pet. App. 1a-77a) is reported at 102 P.3d 445 (Kan. 2004).

## JURISDICTION

The opinion of the lower court was delivered on December 17, 2004. Petitioner's motion for rehearing (J.A. 45-55) was denied on February 2, 2005. Pet. App. 78a. The petition for writ of certiorari was filed on March 2, 2005 and granted on May 31, 2005. J.A. 108. The jurisdiction of the Court rests on 28 U.S.C. § 1257(a). *See infra* § 1 of the Argument.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV.

Section 1257 of Title 28 of the United States Code provides that "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution . . . ." 28 U.S.C. § 1257.

Section 21-4624(e) of Kansas Statutes Annotated provides that "[i]f, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in [Kan. Stat. Ann. §] 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any

mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law." Kan. Stat. Ann. § 21-4624(e).[1]

## STATEMENT

Respondent Michael Lee Marsh II was convicted by a jury in Sedgwick County, Kansas, of capital murder, first-degree premeditated murder, aggravated arson, and aggravated burglary. Pet. App. 9a. The convictions stem from the 1996 murders of Marry Ane Pusch and her nineteen-month-old daughter, M.P. On the evening of June 17, 1996, respondent broke into the Pusch home and waited in a closet for Marry to return home. Shortly after Marry and M.P. entered the house, respondent came out of the closet, repeatedly shot Marry, stabbed her, and slashed her throat. The house was set on fire, and the toddler, M.P., was left to burn to death. *Id.* at 7a-8a.

Respondent was sentenced to death for the capital murder of M.P., life imprisonment with no possibility of parole for 40 years for the first-degree murder of Marry, and consecutive sentences of 51 months for aggravated arson and 34 months for aggravated burglary. *Id.* at 9a-10a.[2]

During sentencing, the judge gave the jury 12 instructions. J.A. 22-28. Pertinent instructions included a listing of those

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[1] In 2004 the Kansas Legislature amended Kan. Stat. Ann. § 21-4624(e) by replacing "as provided by law" with "to life without the possibility of parole."

[2] In the trial court, petitioner maintained that respondent set the house on fire and left M.P. to burn to death, and the jury convicted respondent for those acts. After finding sufficient evidence to support all of respondent's convictions, the Kansas Supreme Court nevertheless reversed respondent's convictions for capital murder and aggravated arson on the grounds that certain evidence was improperly excluded. Pet. App. 11a-17a. While respondent is subject to retrial for capital murder, his eligibility for a sentence of death depends upon the Court's decision on the merits of this case.



aggravating circumstances relied upon by petitioner (J.A. 24, Inst. No. 3), a listing of those mitigating circumstances argued by respondent (J.A. 24-25, Inst. No. 4), and a description of the burden placed upon petitioner. J.A. 26, Inst. No. 5. This latter instruction stated that "[t]he State has the burden to prove to you beyond a reasonable doubt that there are one or more aggravating circumstances [and that if the State does so it] must then prove beyond a reasonable doubt that they are not outweighed by any mitigating circumstances." *Id.* The jury found beyond a reasonable doubt the existence of all three aggravating circumstances asserted by petitioner and that they were not outweighed by any mitigating circumstances. On the basis of these findings, a unanimous jury sentenced respondent to death. J.A. 29.

Respondent pursued his direct appeal to the Kansas Supreme Court. In a 4-3 decision, the lower court held that the Kansas death penalty statute, Kan. Stat. Ann. § 21-4624(e), was unconstitutional on its face. The majority concluded that the statutory weighing equation violated the Eighth and Fourteenth Amendments to the United States Constitution because it provided that a capital defendant "shall be sentenced to death" if the jury determines that the aggravating circumstances are "not outweighed by any mitigating circumstances." Pet. App. 17a-31a. Concluding that this weighing equation effectively directed the imposition of the death penalty if the jury determined that the aggravating and mitigating circumstances were of equal weight, the majority held that such a possibility required the court to invalidate the entire statute on federal constitutional grounds. *Id.* at 19a-20a.

The Kansas Supreme Court found its constitutional footing by looking to its earlier decision in *State v. Kleypas*, 40 P.3d 139, 223-32 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002) (relevant portions of the lower court's decision in *Kleypas* are included at Pet. App. 79a-142a). In *Kleypas*, the lower court held that Kansas' statutory weighing equation

failed to comport with this Court's Eighth Amendment jurisprudence. Rejecting the argument that this Court approved such a weighing equation in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled on other grounds, Ring v. Arizona*, 536 U.S. 584 (2002), the Kansas Supreme Court held in *Kleypas* that the Kansas statutory weighing equation "denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances it finds exist." Pet. App. at 98a-115a.

Rather than invalidating the entire death penalty statute, the *Kleypas* court construed the statute in a way to uphold its constitutionality. To that end, the court ordered that the law could not be applied in a manner in which the death penalty could be imposed when the aggravators and mitigators were in equipoise, and directed sentencing juries be instructed that in order to impose the death penalty, the aggravators must outweigh the mitigators. *Id.* at 115a-119a. In the instant case, the lower court reversed the *Kleypas* court's construction of the statute, and held the statute unconstitutional on its face. *Id.* at 18a-31a.

The majority's decision drew vigorous dissents. *Id.* at 35a-53a (Davis, J., dissenting); 54a-69a (Nuss, J., dissenting); 69a-77a (McFarland, C.J., dissenting). The three dissenting justices agreed that Kansas' death penalty statute was constitutional as written, finding serious flaws with the majority's reading of the Constitution and this Court's precedent. *Id.* The dissenters noted that in *Walton* the Court found no constitutional flaw in the Arizona death penalty statute at issue there, one that is effectively the same as the Kansas statute. *Id.* at 45a-48a (Davis, J., dissenting); 54a-64a (Nuss, J., dissenting). *Walton*, in the dissenters' view, rejected the majority's rationale, *id.*, as did subsequent cases from the Ninth Circuit and the supreme courts of Arizona and Idaho. *Id.* at 48a-50a (Davis, J., dissenting); 64a-69a (Nuss, J., dissenting).



The Kansas Supreme Court, absent discussion, denied petitioner's request for rehearing or modification. Pet. App. 78a.

## SUMMARY OF ARGUMENT

The Kansas Supreme Court's conclusion that the Kansas death penalty statute violates the Eighth and Fourteenth Amendments to the United States Constitution is a final decision under *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), and a final judgment within the meaning of 28 U.S.C. § 1257. Although further state court proceedings are necessary in light of the Kansas Supreme Court's remand on evidentiary issues, those proceedings will not affect the federal issue, and review of the federal issue would be impossible following those proceedings. *See Cox*, 420 U.S. at 481.

Nor are there any adequate and independent state grounds precluding review. In declaring Kan. Stat. Ann. § 21-4624(e) facially invalid, the lower court based its decision squarely on this Court's Eighth Amendment jurisprudence *See Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

As to the merits, the lower court's decision is critically flawed in its determination that *Walton v. Arizona*, 497 U.S. 639 (1990) does not control the outcome. When a nearly identical statute was before the Court in *Walton*, the Court held that requiring a defendant to prove mitigating circumstances sufficiently substantial to call for leniency did not offend the Eighth Amendment. *Id.* at 650. The equipoise concern, which was raised by the *Walton* petitioner in his merits brief and was of no constitutional concern to the Court, *see id.* at 687-88 (Blackmun, J., dissenting), was decided in favor of Arizona.

Even apart from the controlling aspects of *Walton*, Kansas' sentencing procedure does not violate the Eighth Amendment. This Court's post-*Furman v. Georgia*, 408 U.S. 238 (1972) jurisprudence, which provides a framework

for guiding and channeling a sentencing jury's discretion, has not restricted the process by which the aggravating and mitigating circumstances may be weighed. Unquestionably, that mechanism has been left to the states.

In accordance with the Eighth and Fourteenth Amendments and the Court's precedent, Kansas' law both narrows the class of potentially death eligible defendants and places no restrictions, other than relevancy, on the admission of mitigating evidence. The State's capital sentencing equation neither mandates death nor restricts a juror's ability to give full effect to the mitigating circumstances presented by the defendant.

Having satisfied these constitutional requisites, there is nothing in the Eighth Amendment or this Court's decisions interpreting it that prevents Kansas from imposing the death penalty if an aggravating circumstance is found and is not affirmatively outweighed by mitigating evidence. Accordingly, the decision below should be reversed.

## ARGUMENT

### I. THE COURT HAS JURISDICTION TO REVIEW THE STATE COURT'S FEDERAL CONSTITUTIONAL ERROR.[3]

In the order granting certiorari, the Court added two procedural questions to the substantive question of constitutional law presented in the petition: *First*, is the decision below unreviewable under 28 U.S.C. § 1257 because it is not "final?" *Second*, does the decision below rest on an independent and adequate state ground? Both

[3] The contention that the Court lacks jurisdiction because petitioner did not raise the constitutional issue below was raised by respondent in his opposition to the petition for certiorari and addressed by petitioner in its reply brief. Because the Court granted certiorari and did not order the parties to address that issue in their merits briefing, the Court has "necessarily considered and rejected" respondent's contention. *See United States v. Williams*, 504 U.S. 36, 40 (1992).



questions should be answered in the negative. Although further state proceedings remain, the Eighth Amendment issue can be reviewed only at this time, thereby warranting the exercise of § 1257 jurisdiction by the Court. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 481 (1975). Additionally, as the decision below expressly rests on the Eighth Amendment, no independent and adequate state ground exists to preclude this Court from deciding the substantive federal question. *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

#### A. The Decision Below Is "Final" Within The Meaning Of 28 U.S.C. § 1257.

The Court has jurisdiction to review the decision of the lower court because the federal question at issue has been finally decided and, regardless of the outcome of subsequent state proceedings, later review of the federal question cannot be had. Although respondent must be retried on the charges of capital murder and aggravated arson, the determination by the lower court that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts, and if not now addressed by the Court, petitioner will be precluded from seeking further review. Simply put, the decision by the lower court on the instant federal question has entirely eliminated the death penalty in Kansas, and petitioner therefore cannot pursue the death penalty or seek further review of its constitutionality in any future proceedings. Indeed, at this time petitioner cannot even seek to impanel a death-qualified jury for respondent's retrial.

Since the Judiciary Act of 1789, the Court has had jurisdiction to review the "[f]inal judgments or decrees" of state courts of last resort questioning the validity of state statutes under the Federal Constitution. 28 U.S.C. § 1257; *see Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304 (1815). The Court has long adhered to a pragmatic approach to "finality" under § 1257, recognizing that in some circumstances a state court judgment may be sufficiently

final to support the Court's jurisdiction to review a federal question even if further proceedings remain pending in the state courts. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945).

*Cox Broadcasting* articulated the framework for determining when § 1257 authorizes a party to invoke the Court's jurisdiction to review cases "in which the highest court of a State has finally determined the federal issue present in [that] particular case, but in which there are further proceedings in the lower state courts to come." 420 U.S. at 477. "At least four categories" of cases meet these criteria, *id.* at 477, and of the four *Cox Broadcasting* categories, the third is relevant here. Included in the third category are "those situations where the federal claim has been finally decided, with further proceedings on the merits in state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." 420 U.S. at 481. This case fits squarely within this third category.

In addition to declaring the Kansas death penalty statute unconstitutional, the lower court vacated respondent's underlying conviction for capital murder on evidentiary grounds. Pet. App. 11a-17a. At the upcoming retrial ordered by the lower court (*id.* at 17a), respondent could be acquitted of the capital offense, in which case federal double jeopardy and state law would prevent the State from appealing the conviction. *See State v. Crozier*, 587 P.2d 331, 335-36 (Kan. 1978); *State v. Gustin*, 510 P.2d 1290, 1293-94 (Kan. 1973). Alternatively, respondent could again be convicted of capital murder, but he could not be sentenced to death (indeed, the state could not even seat a death-qualified jury) because, under the decision below, there was no valid death penalty statute on the books at the time the crimes were committed. *See Miller v. Jackson*, 199 P.2d 513, 514 (Kan. 1948) ("[A] void statute is tantamount to no statute."); *State v. Carr*, 98 P.2d 393, 396 (Kan. 1940) ("[I]f the statute



is bad, the accusation under it is not good.") (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939))). If respondent were sentenced within Kansas' statutory guidelines – and a life sentence would be within the guidelines for this offense – the State would have no opportunity to appeal as a matter of state law. Kan. Stat. Ann. §§ 21-4701 & 22-3602.[4] Thus, the State will be unable to raise the constitutional issue in future proceedings regardless of whether respondent is acquitted or convicted of capital murder. Accordingly, immediate review is warranted under *Cox Broadcasting*.

The Court's other decisions point to the same conclusion. For example, in *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156 (1973), the Court was asked to address the Supreme Court of North Dakota's holding that the state pharmacy board's denial of the plaintiff's application for a pharmacy permit was invalid because the permit was denied as a result of a state statute that violated federal due process. The state supreme court's remand order required the pharmacy board to review the application without reference to the challenged statute – "sans the constitutional issue," in the words of the state court. *Id.* at 159. Against that backdrop, the Court treated the state court's judgment as final, agreeing that there was no

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[4] Kan. Stat. Ann. § 22-3602(b) provides four possible avenues for the State to appeal as a matter of right. Of the four, at most only § 22-3602(b)(3), which allows the State to appeal "upon a question reserved by the prosecution," is even arguably applicable in this setting. Because questions reserved are permitted only for addressing issues that aid in the correct and uniform administration of criminal law, however, the Kansas Supreme Court would not entertain a question reserved simply to demonstrate errors of a trial court in rulings adverse to the State. Questions reserved, moreover, presuppose that the case has concluded but that an answer to an issue of statewide importance is necessary for proper disposition in future cases. *State v. Roderick*, 911 P.2d 159, 161-62 (Kan. 1996). In short, questions reserved are for those issues of state concern that remain unresolved by the State's highest court. The present issue has been resolved by the Kansas Supreme Court, thus preventing petitioner from availing itself of this avenue.

way that the licensing authority could preserve the constitutional question on remand. *Id.* at 162-63. Kansas finds itself in the same situation because it cannot seek the death penalty on remand in light of the lower court's constitutional decision, nor can it preserve the issue for future review.

The Court's pragmatic approach to finality is particularly appropriate in criminal procedure cases like this one, where the petitioner is unable to secure the Court's review of a federal issue regardless of the outcome of contemplated future proceedings. In such cases, pending proceedings in the state courts – including a full trial on the merits – do not prevent the Court from exercising jurisdiction.

*Cox Broadcasting*, for example, explained that *California v. Stewart*, 384 U.S. 436 (1966), a criminal procedure case, "*epitomizes* this [third] category." 420 U.S. at 481 (emphasis added). In the state proceedings in *Stewart*, the California Supreme Court vacated the defendant's conviction on Fourth Amendment grounds and remanded the case for a new trial. When the State appealed to this Court, the respondent contested jurisdiction on finality grounds, noting that a new trial was upcoming. The Court determined that the state court's Fourth Amendment holding was final for the purposes of § 1257 because the trial would result either in acquittal or conviction without the suspect evidence. Either way, the state courts would have no opportunity to address the federal issue on remand; the decision was thus "final" for jurisdictional purposes. *Stewart*, 384 U.S. at 499 n.71.

The Court has followed this reasoning in a series of other criminal procedure cases, including *New York v. Quarles*, 467 U.S. 649 (1984), where the Court treated a decision by New York's highest state court on an interlocutory suppression issue as final, despite the fact that the defendant had yet to be tried in state court. Because the state court held that certain evidence had to be excluded on constitutional grounds, if the State won at a future trial, the federal



constitutional issue would have become moot; if, on the other hand, the State lost, it would be precluded from pressing the issue on appeal. *Id.* at 651 n.1. The challenged suppression ruling was therefore "final" within the meaning of § 1257. *Id.*

Likewise, in *Florida v. Meyers*, 466 U.S. 380 (1984) and *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court deemed the respective state courts' federal constitutional decisions to be final despite the fact that additional state court proceedings remained. In each case, the Court determined that the state court's constitutional decision was final for jurisdictional purposes because the constitutional issue would not survive remand, regardless of the outcome. *Meyers*, 466 U.S. at 381 n.a1 (Fourth Amendment ruling by lower court final and thus reviewable); *Neville*, 459 U.S. at 558 n.6 (Fifth Amendment ruling by lower court final and thus reviewable). Here, with petitioner in the identical situation, the result should be the same.

Petitioner's inability to seek review of the federal issue in the future distinguishes this case from those that the Court has held to fall outside the third *Cox Broadcasting* category. *See, e.g., Pierce County v. Guillen*, 537 U.S. 129, 142 n.5 (2003); *Florida v. Thomas*, 532 U.S. 774, 779-80 (2001); *Jefferson v. City of Tarrant*, 522 U.S. 75, 82-83 (1997); *O'Dell v. Espinoza*, 456 U.S. 430 (1982). In each of those cases, the petitioners had the option under state law to seek further review of the federal question at some stage of the remaining proceedings. Kansas does not enjoy such an opportunity.

The lower court has issued a final ruling based on its interpretation of the Federal Constitution, coupled with a remand for retrial. Neither the trial nor any other remaining appellate proceedings, however, would provide opportunities for petitioner to raise the federal issue, for the lower courts to address it, or for the Court to review it. In short, the decision below is the last word of Kansas' highest court, *Market*

*Street R. Co. v. Railroad Comm'n of Cal.*, 324 U.S. 548, 551 (1945), and is "final" for the purposes of § 1257.

### B. The Decision Below Is Not Supported By Independent And Adequate State Grounds.

The lower court rested its decision to strike the Kansas death penalty statute on federal constitutional grounds, adopting the language from *State v. Kleypas*, 40 P.3d 139 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002), that "[w]e see no way that the weighing equation in [Kan. Stat. Ann. §] 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible *under the Eighth and Fourteenth Amendments*." Pet. App. 20a (emphasis added); *see also id.* at 35a (Davis, J., dissenting) ("The majority holds that the Kansas death penalty [statute] is unconstitutional on its face under the Eighth Amendment to the United States Constitution."). In so doing, the majority followed *Kleypas*, which likewise invoked the Eighth and Fourteenth Amendments.[5] *See Marsh*, Pet. App. 21a ("After full reconsideration, we . . . continue to adhere to the *Kleypas* majority's reasoning and holding that [Kan. Stat. Ann. §] 21-4624(e) as written is unconstitutional under the Eighth and Fourteenth Amendments.").

Notwithstanding the lower court's express and unequivocal invocation of the Federal Constitution in invalidating the death penalty statute, respondent claims that

[5] In *Kleypas*, appellant submitted that Kan. Stat. Ann. § 21-4624(e) was unconstitutional under the Eighth and Fourteenth Amendments to the Federal Constitution as well as Sections Nine and Eighteen of the Kansas Constitution. J.A. 60. After acknowledging that appellant was asserting violations of both constitutions (Pet. App. 96a), the court nevertheless rested its decision on federal grounds. Pet. App. 115a. That the lower court in *Kleypas* based its decision on Eighth Amendment principles as articulated by this Court's precedents is of no surprise as the lower court, in an earlier passage, reaffirmed its position that it will not interpret the Kansas Constitution in a manner different from that of the United States Constitution. *Kleypas*, 40 P.3d at 252.



the Constitution somehow was not "drawn into question" by the decision below within the meaning of § 1257. Br. in Opp. 17-19. *Cox Broadcasting* disposes of this contention as well. Indeed, the Kansas Supreme Court relied on provisions of the Federal Constitution to a much greater degree than did the Georgia court in *Cox Broadcasting*. Rather than merely referencing a provision of the Federal Constitution as the Georgia court did, the Kansas court explicitly rested its holding on the Eighth and Fourteenth Amendments. Pet. App. 18a-21a. The Federal Constitution, in other words, was clearly drawn into question for the purposes of § 1257. *See, e.g., Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1984) (noting that federal law is sufficiently drawn into question if the federal question "had been either raised or squarely considered and resolved in state court").

Any other reading of the Kansas Supreme Court's decision would mark a significant departure in that court's historical constitutional jurisprudence. As the lower court has made clear, the Kansas Constitution "has never extended greater protection to our citizens beyond the federal guarantees." *State v. Spain*, 4 P.3d 621, 625 (Kan. 2000). And where a state court interprets state and federal constitutional protections to be identical, no adequate and independent state ground exists to support the state court's decision. *Fitzgerald v. Racing Assoc. of Central Iowa*, 539 U.S. 103, 106 (2003); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990). In such circumstances, the state court's decision "rest[s] upon federal grounds sufficient to support this Court's jurisdiction." *Fitzgerald*, 539 U.S. at 106.

Because the decision below rests exclusively on federal grounds, the Court need not scour state law in search of a potential state ground that could preclude its jurisdiction. *See Long*, 463 U.S. at 1040-41 ("[W]hen the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case

the way it did because it believed that federal law required it to do so."); *see also Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (That the state court "might have, but did not, invoke state law does not foreclose jurisdiction [in this Court]."); *California v. Ramos*, 463 U.S. 992, 997-98 n.7 (1983). Here, where it is clear that the state court rested its decision solely on federal grounds, the Court has jurisdiction to review the lower court's erroneous determination that the state death penalty statute violated the Federal Constitution.

## II. KANSAS' CAPITAL SENTENCING SYSTEM, WHICH DIRECTS THAT THE DEATH PENALTY SHALL BE IMPOSED UPON THOSE CONVICTED OF CAPITAL MURDER WHEN THE AGGRAVATING CIRCUMSTANCES ARE NOT OUTWEIGHED BY THE MITIGATING CIRCUMSTANCES, IS CONSTITUTIONAL.

### A. In *Walton v. Arizona*, The Court Found No Constitutional Infirmity In The Weighing Equation Of Arizona's Capital Sentencing Law – Which Is Functionally The Same As The Weighing Equation In Kan. Stat. Ann. § 21-4624(e).

The Court has already considered the very issue now before it, and reached a conclusion opposite that of the lower court. In *Walton v. Arizona*, the Court granted certiorari to resolve a conflict between the Arizona Supreme Court, which upheld Arizona's death penalty statute, and the Ninth Circuit, which found the statute unconstitutional. 497 U.S. at 647. In *Adamson v. Ricketts*, 865 F.2d 1011, 1044 (9th Cir. 1988), the Ninth Circuit held that the Arizona statute was unconstitutional because, among other reasons, it provided for the imposition of the death penalty if the defendant failed to establish that mitigating circumstances outweighed any aggravating circumstances. According to the Ninth Circuit, such a weighing system violated the



Eighth Amendment "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death." *Id.*

The *Walton* Court rejected that conclusion, holding that such a weighing equation does not violate the Constitution:

> So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency.

497 U.S. at 650. The Court further noted that, so long as the sentencer is not precluded from considering relevant mitigating evidence and the statute does not automatically impose death upon conviction for certain types of murder, "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence" in capital cases. *Id.* at 652 (quoting *Boyde v. California*, 494 U.S. 370, 377 (1990)).

The Kansas Supreme Court, however, declined to follow *Walton* on the grounds that (1) the Kansas and Arizona statutes are "distinguishable" because "[t]he Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances," and (2) "the issue of equipoise was not raised or decided in *Walton*." Pet. App. 102a-103a. Neither ground withstands scrutiny.

The Arizona law at issue in *Walton* directed that in a capital case, the sentencing court "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated ... and that there are no mitigating circumstances sufficiently substantial to call for

leniency." 497 U.S. at 644. The Arizona Supreme Court, both before and after *Walton*, has consistently construed Arizona's capital sentencing law to mean that the death penalty shall be imposed unless the aggravating circumstances are outweighed by the mitigating circumstances. *State v. Ysea*, 956 P.2d 499, 502 (Ariz. 1998) ("If the judge finds one or more of the aggravating factors listed in § 13-703(F), the defendant is death eligible, and if the aggravating factors are not outweighed by mitigating factors listed in § 13-703(G), the resulting sentence is death."); *State v. Gretzler*, 659 P.2d 1, 14 (Ariz. 1983) (citing cases wherein mitigators were insufficient to outweigh aggravating circumstances). Likewise, the Ninth Circuit has interpreted Arizona's capital sentencing law in the same manner. *Adamson*, 865 F.2d at 1041-43.

Under the Arizona capital sentencing statute, the burden of proving the existence of aggravating circumstances was on the prosecution and the burden of proving mitigating circumstances was on the defendant. Thus, once the prosecution had proven the existence of at least one or more aggravating circumstances, the burden was then placed upon the defendant to prove sufficient mitigating circumstances to overcome such aggravating circumstance(s) and convince the sentencing court that a sentence other than death was warranted. Ariz. Rev. Stat. § 13-703; *Adamson*, 865 F.2d at 1026.

Kan. Stat. Ann. § 21-4624(e) operates in essentially the same manner, although it puts a slightly greater burden on the State. Section 21-4624(e) directs that following a capital conviction, once the prosecution has proven beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances, a death sentence shall be imposed unless the sentencing jury determines that the aggravating circumstances are outweighed by any mitigating circumstances found to exist. Thus, as with the Arizona law upheld in *Walton*, in Kansas once the



prosecution meets its burden of proving the existence of one or more aggravating circumstances, the defendant then bears the burden of presenting mitigating circumstances. The only difference is that, unlike the Arizona law, in Kansas once the defendant has presented mitigating evidence, the defendant does not bear the burden of convincing the sentencer that a sentence other than death is warranted. Rather, the State then must carry the burden of convincing the sentencer, beyond a reasonable doubt, that the aggravators are not outweighed by the mitigators and that a sentence of death is appropriate. J.A. 26, Inst. No. 5. While this difference puts a greater burden on the State of Kansas, it does not alter the fact that the sentencing systems in both statutes, although worded differently, are functionally the same.

*Walton* held that it is constitutional to place the burden on a defendant to prove that mitigators outweigh aggravators. Certainly, then, it is constitutional to impose a death penalty where the *State* has proved, beyond a reasonable doubt, that mitigators do not outweigh aggravators.

The Kansas Supreme Court's second ground for declining to follow *Walton* fares no better. Contrary to the lower court's belief, the central issue of this case – whether it is constitutional to impose the death sentence when the sentencer finds that the aggravating and mitigating circumstances are equally balanced – was plainly presented and considered by the *Walton* Court. Among other grounds, the petitioner in *Walton* challenged the Arizona statute because "the defendant must not only establish the existence of a mitigating circumstance, but also must bear the risk of nonpersuasion that any mitigating circumstances will not outweigh the aggravating circumstance(s)" and "in situations where the mitigating and aggravating circumstances are in balance ... the statute bars the court from imposing a sentence less than death." Brief of Petitioner at 34, 37-38, *Walton v. Arizona*, 497 U.S. 639 (1990). Moreover, as noted, among the reasons the Ninth Circuit held Arizona's

statute unconstitutional in *Adamson* was "because in situations where the mitigating and aggravating circumstances are in balance . . . the statute bars the court from imposing a sentence less than death." 865 F.2d at 1043.

The *Walton* Court explicitly stated that certiorari was granted in that case because the Ninth Circuit in *Adamson* found Arizona's death penalty unconstitutional for the same reasons submitted by Walton. 497 U.S. at 647. Thus, while it is true that the *Walton* Court did not use the term "equipoise," there can be no doubt that the Court considered the issue and (in Parts III and IV of its opinion) rejected the argument that imposing the death penalty in an "equipoise" situation is unconstitutional, as the *Walton* dissent unhesitatingly acknowledged. *Id.* at 687-88 (Blackmun, J., dissenting). In upholding the statute, the *Walton* Court necessarily rejected the Ninth Circuit's reasoning and accordingly rejected the very rationale relied upon by the Kansas Supreme Court in holding Kansas' capital sentencing system unconstitutional. *See Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990) (the Court implicitly rejected a particular argument briefed by respondent in *Zant v. Stephens*, 462 U.S. 862 (1983), and raised by the dissent in *Barclay v. Florida*, 463 U.S. 939 (1983), by refusing to address the argument in its majority opinions).

With this in mind, reading the *Walton* decision as the lower court did is nonsensical in terms of what the Court sought to accomplish in *Walton*. The Court stated: "Because the United States Court of Appeals for the Ninth Circuit has held the Arizona death penalty statute to be unconstitutional for the reasons submitted by Walton in this case . . . we granted certiorari to resolve the conflict...." 497 U.S. at 647 (internal citations omitted). If the Court did not reject the Ninth Circuit's holding that the Arizona capital sentencing statute is unconstitutional "because in situations where the mitigating and aggravating circumstances are in



balance ... the statute bars the court from imposing a sentence less than death," *Adamson*, 865 F.3d at 1043, then the conflict remained unresolved. But that was not the outcome of *Walton*. Rather, the Court rejected the argument that this created an unconstitutional presumption in favor of death and upheld Arizona's death penalty statute as interpreted by the Arizona Supreme Court.

Thus, in *Walton*, the Court considered the very issue now before it and squarely ruled that a capital sentencing statute may, consistent with the Constitution, impose the death penalty when the aggravating circumstances are not outweighed by the mitigating circumstances.[6] The decision of the lower court in this case contradicts the *Walton* holding and must be reversed.

### B. The Kansas Capital Sentencing System Meets The Constitutional Requirements Set Forth In The Court's Post-*Furman* Death Penalty Jurisprudence.

Even if this were an issue of first impression, as claimed by the lower court (Pet. App. 21a), Kansas' death penalty law meets constitutional requirements because it establishes rational criteria for narrowing the class of death eligible defendants and it does not limit in any way the sentencing jury's consideration of relevant mitigating circumstances that could cause it to decline to impose the death penalty. *See Blystone v. Pennsylvania*, 494 U.S. 299, 308-09 (1990). For these reasons, the Kansas capital sentencing system satisfies

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[6] Since *Walton*, various courts around the country have declared their understanding that *Walton* so held, including the Eleventh Circuit, *see Jones v. Dugger*, 928 F.2d 1020, 1029 (11th Cir. 1991), the Ninth Circuit, *see Adamson v. Lewis*, 955 F.2d 614, 619 (9th Cir. 1992), and *Richmond v. Lewis*, 948 F.2d 1473, 1481-83 (9th Cir. 1992), the Supreme Court of Arizona, *see State v. Gulbrandson*, 906 P.2d 579, 605 (Ariz. 1995), and *State v. Greenway*, 823 P.2d 22, 27 (Ariz. 1991), and the Supreme Court of Idaho, *see State v. Hoffman*, 851 P.2d 934, 942-43 (Idaho 1993).

the constitutional requirements set out in the Court's death penalty jurisprudence since its landmark decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

For over 30 years, the holding in *Furman* has represented the constitutional standard against which state capital sentencing systems are measured. In *Furman*, the Court held that death sentences imposed under state statutes that gave the sentencer complete discretion to impose the death penalty violated the Eighth Amendment's prohibition against cruel and unusual punishment. *See id.* at 239-40. Today, *Furman* "has come to stand for the principle that a sentencer's discretion to return a death sentence must be constrained by specific standards, so that the death penalty is not inflicted in a random and capricious fashion." *Walton*, 497 U.S. at 657 (Scalia, J., concurring).

Subsequent decisions have further refined and guided capital sentencing laws. For example, following *Furman*, the Court, in *Gregg v. Georgia*, 428 U.S. 153, 189 (1976), held that states must channel and limit the discretion of sentencers in capital cases "so as to minimize the risk of wholly arbitrary and capricious action." At the same time, sentencers must still be allowed to consider all relevant aspects of the character and record of the individual offender and the circumstances of the particular offense. *See Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). One approved method for satisfying these competing goals in a capital sentencing system is the type employed by Kansas in which the aggravating and mitigating circumstances are established by evidence and then weighed against each other. *See Proffitt v. Florida*, 428 U.S. 242, 257-58 (1976).

While the Court has required the states to provide clear and objective standards for guiding and channeling the sentencer's discretion, *see, e.g., Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), the actual method and formula for weighing aggravating and mitigating circumstances in



capital sentencing has traditionally been left to the states. Because "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances," *Zant v. Stephens*, 462 U.S. 862, 890 (1983), the Court has "never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988).

States thus enjoy "a constitutionally permissible range of discretion in imposing the death penalty." *Blystone*, 494 U.S. at 308-09. To implement a valid capital sentencing system, a state must adhere to two guiding constitutional principles:

> First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold.... Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty.

*Id.* (quoting *McKleskey v. Kemp*, 481 U.S. 279, 305-06 (1987)).

Plainly, the Kansas capital sentencing system satisfies these constitutional requirements by narrowing the scope of death eligible defendants in two respects. Initially, for the death penalty to be considered as a possibility, a defendant must be convicted of capital murder. Under Kansas law, the charge of capital murder differs from the charge of first degree premeditated murder in that one or more specific elements beyond intentional premeditated murder must be proven. Kan. Stat. Ann. § 21-3439.[7] Then, following a

[7] These additional elements include: (1) the killing occurred during the commission of kidnapping or aggravated kidnapping with intent to ransom, (2) a contract killing, (3) a killing committed while incarcerated,

capital murder conviction, a defendant becomes eligible for the death penalty only if the State proves beyond a reasonable doubt the existence of one or more specifically enumerated aggravating circumstances. Kan. Stat. Ann. §§ 21-4624(e) and 21-4625.[8] Collectively, these statutory requirements narrow the class of potentially death eligible defendants by limiting it to only a small subset of murderers who have not only committed intentional premeditated murders, but committed them in a particularly nefarious fashion, and then further narrows this small group by limiting actual death eligibility to those capital murderers who committed their crime under particularly aggravated circumstances. Kansas' law clearly meets the constitutional requirements of narrowing the threshold of death eligible defendants.

The Kansas capital sentencing system satisfies the second constitutional requirement because it places no restriction, other than relevancy, on the admission of any evidence relating to any mitigating circumstances. Kan. Stat. Ann. § 21-4624(c). As a result, the jury is not restricted in any way

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(4) the killing of the victim of rape, sodomy, or aggravated sodomy during the commission of or subsequent to such crime, (5) the killing of a law enforcement officer, (6) killing of more than one person, and (7) the killing of a child during the commission of kidnapping or aggravated kidnapping with intent to commit a sex offense. Kan. Stat. Ann. § 21-3439.

[8] The aggravating circumstances are limited to the following: (1) the defendant was previously convicted of a felony in which the defendant inflicted great bodily harm or death, (2) the defendant knowingly killed or created a great risk of death to more than one person, (3) the defendant committed the murder for pecuniary gain, (4) the defendant authorized or hired someone else to commit the murder, (5) the defendant committed the murder to avoid arrest or prosecution, (6) the defendant committed the murder in an especially heinous, atrocious, or cruel manner, (7) the defendant committed the murder while serving a prison sentence for a felony conviction, and (8) the victim was killed because he was, or was going to be, a witness in a criminal proceeding. Kan. Stat. Ann. § 21-4625.



from considering, and giving effect to, any and all mitigating evidence presented. The jury is able to conduct an individualized determination of whether the death penalty is appropriate based on the character and record of the defendant and the circumstances of the crime. *Tuilaepa v. California*, 512 U.S. 967, 972 (1994).

Beyond these two requirements, the Court has not limited the procedures by which States may impose the death penalty. *Blystone*, 494 U.S. at 309 ("Within the constitutional limits defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished."). The Court has never required that the states adopt a particular type of weighing system, nor has it directed a particular manner in which sentencing juries must consider aggravating and mitigating evidence.

Indeed, in *Zant*, the Court stated, "the Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." 462 U.S. at 890. This was reiterated in *Harris v. Alabama*, 513 U.S. 504, 512 (1995), where the Court reaffirmed, "[w]e have rejected the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required'" (quoting *Franklin*, 487 U.S. at 179). Requiring a State to apply a specific weighing equation directed by the Supreme Court "would offend . . . established principles and place within constitutional ambit micromanagement tasks that properly rest within the State's discretion to administer its criminal justice system." *Id.*

Not long after *Harris*, the Court reaffirmed that in the capital sentencing context, "[a] state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). The Court again noted, "we have never gone

further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible." *Id.* (citing *Tuilaepa*, 512 U.S. at 978-79).

The Court's holdings consistently emphasize that once the class of death eligible defendants is appropriately narrowed, the risk of cruel and unusual punishment is diminished and all that the Constitution requires in addition is an individualized determination of the appropriate penalty. *Tuilaepa*, 512 U.S. at 982-83 (Stevens & Ginsburg, JJ., concurring). The right to an individualized determination is not infringed by the way in which the jury is directed to balance the aggravating and mitigating circumstances. Indeed, because it is not even constitutionally necessary to define particular evidence as aggravating or mitigating, *id.* at 983-84 (Stevens & Ginsburg, JJ., concurring), it is equally unnecessary to require a certain weighing calculus in the sentencing system. Other than the constitutional requirement that the sentencer be allowed to consider any relevant evidence, the weighing equation is controlled by state law, not the Eighth Amendment. *Blystone*, 494 U.S. at 309.

Thus, "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Buchanan*, 522 U.S. at 276. The Kansas capital sentencing system does not preclude the jury from considering and giving effect to any mitigating evidence but merely channels the jury's discretion by directing when the jury shall, based on its assessment of the mitigating and aggravating circumstances, find that the death penalty is the appropriate sentence. This is in accordance with constitutional requirements.

In sum, the Kansas capital sentencing system clearly narrows the class of persons eligible for the death penalty, and it allows the sentencing jury to consider any relevant



mitigating circumstance. Kan. Stat. Ann. § 21-4624(c). The weighing equation does not prevent an individualized determination of whether the death penalty is appropriate, and does not require a juror to vote for the death penalty unless he or she decides, upon the completion of the weighing process, that death is the appropriate penalty in light of all the circumstances. Accordingly, the Kansas capital sentencing system meets the constitutional requirements that have been set forth by this Court, and the lower court erred in finding it unconstitutional.

### C. The Kansas Capital Sentencing System Does Not Create A Presumption In Favor Of Death.

The Kansas capital sentencing system begins with a presumption that life in prison is the appropriate sentence for capital murder and never directs mandatory imposition of the death penalty. Arguments to the contrary are both factually and legally without merit. In accordance with the reasoning set forth in *Walton*, *Boyde*, and *Blystone*, Kan. Stat. Ann. § 21-4624(e) is not impermissibly mandatory and is therefore constitutional.

Without question, the Kansas capital sentencing system begins with a presumption that life in prison – not death – is the appropriate sentence for capital murder. Indeed, Kan. Stat. Ann. § 21-4706(c) states that, except as otherwise provided in the statutory system for holding a separate sentencing hearing, the sentence for the crime of capital murder shall be imprisonment for life.

The death penalty becomes a *possibility* only if the State, after a capital conviction, goes forward with a separate sentencing hearing in accordance with § 21-4624. At the sentencing proceeding, the State bears the burden of proving beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. Kan. Stat. Ann. § 21-4624(c) & (e). If the State fails in its burden, the sentence is life imprisonment. If, on the other hand, the State succeeds,

it then bears the burden of proving beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances. J.A. 26, Inst. No. 5. Should the State fail here, the sentence is again life imprisonment. Moreover, if the jury is unable to reach a unanimous decision, the sentence is life imprisonment. Kan. Stat. Ann. § 21-4624(c).

In many ways, the capital sentencing proceeding is analogous to a criminal trial, where the defendant begins with a presumption of innocence and the State must prove the elements of the crime beyond a reasonable doubt to obtain a guilty verdict. In a capital sentencing hearing, the defendant begins with the presumption that he will receive life imprisonment, and the State must prove the existence of one or more aggravating factors beyond a reasonable doubt before the defendant is eligible for a death sentence. And even if the State proves aggravating circumstances beyond a reasonable doubt, the death penalty is not automatic or mandatory. The jury is still given the option of returning a life sentence after considering all relevant mitigating evidence. Thus, if any one member of the jury has a reasonable doubt that aggravating circumstances exist or that the aggravating circumstances are not outweighed by the mitigating circumstances, the sentence will be life imprisonment. This is hardly indicative of a presumption in favor of death.

Further demonstrating that the Kansas system does not presume death is the fact that the burden remains upon the State to prove that the aggravating circumstances are not outweighed by the mitigating circumstances. The defendant, never bearing the burden of proving that the mitigating circumstances outweigh the aggravating circumstances, simply has the obligation of presenting the mitigating evidence. Indeed, because the State bears the burden of proving that the aggravators are not outweighed by the mitigators, the Kansas capital sentencing system embodies



an initial presumption that the mitigating circumstances outweigh the aggravating circumstances (and thus the appropriate sentence is life imprisonment). Only after the State overcomes this presumption is the death penalty deemed appropriate.

At the heart of the presumption of death challenge to Kan. Stat. Ann. § 21-4624(e) is the language that "the defendant shall be sentenced to death" when the jury determines the aggravating circumstances are not outweighed by the mitigating circumstances. Opponents of the law argue that this language imposes a mandatory death sentence when the aggravating and mitigating circumstances are in equipoise, and thus effectively establishes a presumption in favor of death. *See, e.g.*, J.A. 64, 73, 90.

This argument not only fails to acknowledge the significance of Kansas' burden of proof, but it also fails to come to terms with the Court's precedents. Those decisions make clear that so long as eligibility for the death sentence is properly narrowed and full consideration of mitigating evidence is allowed, States may channel a sentencing jury's discretion by establishing the circumstances that result in a sentence of death. The Kansas provision stating that the defendant "shall be sentenced to death" if the State proves beyond a reasonable doubt that aggravators are not outweighed by mitigators is no more impermissibly "mandatory" than the challenged statutes upheld in *Walton*, *Boyde*, and *Blystone*.

In *Blystone*, the defendant argued that Pennsylvania's death penalty "was unconstitutional because it mandated a sentence of death based on the outcome of the weighing process." 494 U.S. at 302. Blystone had been convicted of murder with an aggravating circumstance, and the jury found no mitigating circumstances existed. *Id.* The statute at issue directed that, under such circumstances, "[t]he verdict must be a sentence of death." *Id.* Blystone argued that this requirement rendered his sentencing proceeding "unreliable"

and Pennsylvania's death penalty unconstitutional because the mandatory feature "precluded the jury from considering whether the severity of his aggravating circumstance warranted the death sentence." *Id.* at 306; *cf.* J.A. 88-89 (Amicus Brief of Cornell Death Penalty Project, *State v. Kleypas*, 40 P.3d 139 (Kan. 2001) ("§ 21-4624(e) makes judgments of death in Kansas unreliable . . . . A death sentence imposed pursuant to § 21-4624(e) cannot with any confidence be said to reflect the jury's 'reasoned *moral* response to the defendant's background, character, and crime.' [citations omitted] Instead, it will often represent nothing more than the operation of a presumption in favor of death.")).

Rejecting *Blystone*'s arguments, the Court explained that "the presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Blystone*, 494 U.S. at 306-07. "The requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Id.* at 307.

Allegations that the Kansas statute is impermissibly mandatory or creates an impermissible presumption in favor of the death penalty are equally unavailing. As was the case with the state statute in *Blystone*, under § 21-4624(e) it is the outcome of the weighing process that determines whether a sentence of death is warranted. And while Kansas' weighing formula may differ in some degree from the formulas of other weighing states, *see, e.g.*, Idaho Code § 19-2515(7)(a) (imposing a sentence of death when "the jury finds that a statutory aggravating circumstance exists and no mitigating circumstances exist which would make the imposition of the death penalty unjust"); Ohio Rev. Code § 2929.03(D)(2) (allowing a sentence of death only where the "aggravating circumstances . . . outweigh the mitigating factors"), it



remains true that there is no constitutional requirement for a particular weighing formula. *See Franklin*, 487 U.S. at 179; *Zant*, 462 U.S. at 890. Once the aggravating circumstances are established, there is no constitutional requirement that they be weighed any further at all, so long as the jury is allowed to consider all relevant mitigating evidence. *Blystone*, 494 U.S. at 306-07. Section 21-4624(e) clearly allows for such consideration and simply channels the jury's discretion in a constitutional manner to ensure effectiveness and consistency. *See Boyde*, 494 U.S. at 377.

In *Silagy v. Peters*, 905 F.2d 986 (7th Cir. 1990), the Seventh Circuit took a dim view of a similar presumption of death argument as part of a challenge to the constitutionality of Illinois' death penalty provision. The statute at issue there provided that "[i]f the jury determines unanimously that there are no mitigating factors sufficient to preclude the imposition of the death sentence, the court shall sentence the defendant to death." *Id.* at 998. In rejecting the presumption of death argument, the court of appeals explained that such language provided the guidance necessary to ensure fair and consistent application of the death penalty:

> A statutory scheme which calls for a particular body, such as the sentencing authority under [Illinois' death penalty statute], to weigh various factors must guide that body as to the results which follow from a determination that one set of factors outweighs the other. If no such guidance were given, the weighing process itself would be rendered ineffective as a means of arriving at similar results in similar situations. For example, if a jury were asked to weigh various mitigating and aggravating circumstances in a particular defendant's case, but were not given any guidance as to the sentence which must be imposed based upon the balance they strike between those competing considerations, there would be no means of preventing a jury from imposing a death sentence even in those situations in which the mitigating circumstances

> outweighed the aggravating circumstances. Certainly, such a statutory scheme would run afoul of the eighth amendment's guarantee that the death penalty not be imposed in an 'arbitrary or capricious' manner. By providing for a certain result based on the balance struck by the jury between the aggravating and mitigating circumstances, [Illinois' death penalty statute] does not impose a burden of persuasion on the defendant. *Rather, it serves to ensure that similar results will be achieved in similar circumstances while, at the same time, allowing the jury to consider the individual characteristics of the defendant and the particularized nature of the crime.*

*Id.* at 999 (emphasis added).

Recognizing that "the sentencing determination is 'a process of balancing intangibles, not of proving facts,'" *id.* at 998 (quoting *People v. Bean*, 560 N.E.2d 258, 292 (Ill. 1990)), and that "at this point in the hearing the prosecution has already proven beyond a reasonable doubt that a statutory aggravating factor exists making the defendant eligible for the death penalty," *id.*, the *Silagy* court found no constitutional infirmity in Illinois' law. Rather, it held that the weighing instructions "in a constitutional way guide[] the jury . . . in determining under what circumstances the death penalty should be imposed." *Id.*

The same can be said for Kansas' sentencing law. Before any weighing occurs under § 21-4624(e), the fact finder has already determined beyond a reasonable doubt that the defendant is guilty of capital murder and, further, that aggravating circumstance(s) exist. Once those predicates are in place, § 21-4624(e) guides the jury's discretion in determining when the death penalty should be imposed. The "shall impose" language simply ensures that capital sentencing in Kansas is applied in a fair and consistent manner. While the jury is never precluded from considering and giving effect to mitigating circumstances, its discretion as to what sentence to impose after it has weighed the



circumstances is carefully directed so that similar results are obtained in similar circumstances. In this way, Kansas' capital sentencing system avoids the arbitrary and seemingly random imposition of the death penalty that caused the Court concern in *Furman*.

### D. The Kansas Capital Sentencing System Does Not Mandate A Sentence Of Death When The Jury Is Unable To Determine That Death Is The Appropriate Sentence.

Kan. Stat. Ann. § 21-4624(e) directs a sentencing jury to choose between two sentencing options – death or life imprisonment. *See also* J.A. 27, Inst. Nos. 10 and 11. A decision that death is the appropriate sentence must be unanimous. Kan. Stat. Ann. § 21-4624(e); *see also* J.A. 27, Inst. No. 10. Anything other than a unanimous decision in favor of death results in a sentence of life imprisonment. Kan. Stat. Ann. §§ 21-4624(e) and 21-4706(c); *see also* J.A. 28, Inst. No. 12.

Despite the heavy presumption in favor of life imprisonment, respondent and others argue that the Kansas capital sentencing system is constitutionally flawed because its weighing equation "requires a capital jury to return a death sentence not only when it decides that the defendant deserves death … but also when it does not decide that death is the deserved punishment." J.A. 88-89 (*Amicus* Brief of Cornell Death Penalty Project, *State v. Kleypas*, 40 P.3d 139 (Kan. 2001); *see also* J.A. 62 (Brief of Appellant, *State v. Kleypas*, 40 P.3d 139 (Kan. 2001)). This argument ignores the plain language of the statute and jury instructions and relies on the flawed premise that when a jury decides that the aggravating and mitigating circumstances are in equipoise, and thus imposes the death penalty, the jury has failed to make a decision. To the contrary, in such a case the jury *has* made a decision; it has unanimously decided that the death penalty is the appropriate sentence.

The idea that a determination that the aggravating and mitigating circumstances are in balance represents juror confusion or inability to decide between life and death is simply illogical. Saying that the aggravators and mitigators weigh equally is not the same as saying one cannot decide between a life sentence and death. Finding the aggravators and mitigators in equipoise is a reasoned conclusion and represents an affirmative determination that death is the appropriate sentence.

The picture painted by respondent of befuddled jurors struggling to decide which weighs more and ultimately throwing up their hands and saying, "We can't decide, so we have to impose death," is pure fancy. It ignores the clear instructions given to jurors and unfairly presumes juror confusion. The statute and jury instructions make clear that if jurors cannot reach a decision, then life imprisonment shall be the sentence. The jury instructions are very specific about when the death penalty can be imposed, and it is presumed that juries follow their instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). The suggestion that confused jurors, unable to reach a decision, would ignore their clear instructions and unanimously impose a death sentence, the most consequential penalty in our legal system, is not only preposterous, but it is also an unflattering commentary on the abilities of those citizens who carry out their duty of jury service.

The flaw in this argument is that it confuses the weighing equation with the ultimate decision that must be made. Respondent sees three possibilities: the aggravators outweigh the mitigators, the mitigators outweigh the aggravators, or the aggravators and mitigators are in equipoise. He then concludes that the third possibility represents an inability to make a decision. Such analysis misses the point: the weighing process is merely a means to reach a decision. The ultimate decision remains life or death. A determination that the mitigators outweigh the aggravators leads to a decision



that life in prison is the appropriate sentence. A determination that the aggravators outweigh the mitigators, or that they are in balance, leads to a decision that death is the appropriate sentence. A complete inability to reach a decision, however, results in the presumed sentence of life imprisonment.

It cannot be stressed enough that "the ultimate choice in capital sentencing … is a unitary one – the choice between death and imprisonment," *Walton*, 497 U.S. at 656 (Scalia, J., concurring), and jurors in a capital sentencing proceeding understand that reality. They know that their final decision is either death or life imprisonment. They deliberate and decide one way or the other. The weighing process itself is simply a means to that end. It is an entirely subjective process, dealing with unquantifiable intangibles. Aggravators and mitigators cannot actually be weighed – the term "weigh" as used in capital sentencing simply means to consider and subjectively evaluate. Each juror makes an individualized determination of the relative moral weights to attribute to each aggravating and mitigating circumstance. After this individual consideration and evaluation, a juror makes a subjective, qualitative rather than quantitative, determination for death or life. In the final analysis, the aggravating circumstances are either so bad that the defendant deserves death, or the mitigating circumstances are so compelling that the defendant deserves to be spared. On this ultimate decision, there is no possibility of a tie.

With this in mind, the notion that the entire jury could find itself at the tipping point is at most a philosophical abstraction. If even one juror believes that the mitigators outweigh the aggravators, a death sentence will not be imposed. Therefore, when a Kansas jury returns a death penalty, there can be no doubt that it represents the jury's reasoned, unanimous conclusion that death is the appropriate sentence.

For these reasons, the Kansas capital sentencing system satisfies all constitutional requirements. The statute does not mandate the death penalty when the jury is unable to unanimously decide that such a sentence is appropriate. In the unusual event that a juror was to conclude that the aggravating and mitigating circumstances were in equipoise, such would represent not an inability to decide, but a reasoned conclusion after full consideration of the mitigating circumstances that death is warranted. The Constitution does not demand more.

### E. The Kansas Capital Sentencing System Allows A Sentencing Jury To Give Full Effect To All Mitigating Circumstances.

The plain statutory language of Kan. Stat. Ann. 21-4624(e) authorizes a sentencing jury to consider and give effect to all mitigating circumstances. The lower court, however, held that Kansas' capital sentencing system somehow precludes jurors from giving full effect to the mitigating circumstances. *See Kleypas*, Pet. App. 114a. This conclusion is illogical. For a juror to come to *any* conclusion regarding whether the aggravating circumstances weigh more than, less than, or equal to the mitigating circumstances, the juror must have considered and given full effect to both sets of circumstances, as subjectively weighed in that juror's mind.

To be sure, "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty." *Blystone*, 494 U.S. at 309. However, channeling the jury's discretion *after* it has considered and weighed all mitigating circumstances, as Kan. Stat. Ann. § 21-4624(e) does, is not the same as limiting the jury's ability to consider and give effect to relevant mitigating circumstances. Guiding the jury's discretion after consideration of all relevant circumstances is constitutionally permissible. *Boyde*, 494 U.S. at 377. The weighing equation embodied in Kan. Stat. Ann. § 21-4624(e)



does not in any way interfere with the jury's consideration of mitigating evidence and therefore does not run afoul of the Constitution. *Id.*

The defendant in *Blystone* unsuccessfully asserted the same argument. Blystone argued that because the statute in question mandated the death penalty when aggravating circumstances were proven and no mitigating circumstances existed, it "unconstitutionally limited the jury's consideration of unenumerated mitigating circumstances." 494 U.S. at 306. The Court, however, held that because the jury was instructed that it could consider any mitigating circumstances, the fact that the jury was directed to impose the death penalty upon finding no mitigating circumstances was not unconstitutional. Nothing prevented the jury from considering and giving full effect to any mitigating circumstances.

Likewise, Kan. Stat. Ann. § 21-4624(e) does not limit the jury's consideration of mitigating circumstances. Each juror is free to consider any and all mitigating circumstances and to give them whatever weight and effect the juror subjectively determines is appropriate. If the jurors individually and collectively determine that the mitigating circumstances do not outweigh the aggravating circumstances, the jurors have not failed to give full effect to the mitigators – they have only failed to give them the effect desired by the defendant.

In truth, nothing in Kan. Stat. Ann. § 21-4624(e) prevents the jury from declining to impose the death penalty on the basis of any mitigating evidence presented. Equally true, if the jury chooses to impose the death sentence, it does not mean that they have not been allowed to give the mitigating circumstances their full effect; it simply means that the jury has considered the full effect of the mitigators and concluded that, in spite of them, death is the appropriate sentence.

## CONCLUSION

The judgment of the lower court declaring Kan. Stat. Ann. § 21-4624(e) unconstitutional on its face should be reversed and the case remanded accordingly.

Respectfully submitted,

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No. 04-1170

IN THE

# Supreme Court of the United States

KANSAS,

*Petitioner,*

v.

MICHAEL LEE MARSH II,

*Respondent.*

**ON WRIT OF CERTIORARI TO THE KANSAS SUPREME COURT**

## BRIEF OF THE STATES OF ARIZONA, ALABAMA, COLORADO, GEORGIA, IDAHO, LOUISIANA, MISSISSIPPI, MONTANA, NEVADA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, VIRGINIA AND WASHINGTON AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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## QUESTION PRESENTED

*Amici* will address only the substantive question presented in this case, i.e., whether it violates the Eighth Amendment for a State capital-sentencing statute to allow the imposition of the death penalty when the sentencer determines that the mitigating and aggravating evidence is in equipoise.

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## INTERESTS OF AMICI CURIAE

*Amici* States strongly oppose the effort by the Kansas Supreme Court, under the guise of the Eighth Amendment, to increase judicial regulation of the process by which the States determine whether to impose the death penalty on defendants found guilty of capital murder. As this Court has repeatedly recognized, the organization and management of capital sentencing processes is a core aspect of state sovereignty, and review of those procedures under the federal Constitution should therefore be "quite deferential." *Tuilaepa* v. *California*, 512 U.S. 967, 973 (1994).

The Eighth Amendment theory adopted by the Kansas Supreme Court, however, would cast serious doubt upon capital sentencing procedures in numerous states besides Kansas. Most obviously, the Kansas Supreme Court's requirement that the sentencer reject the death penalty if it finds the aggravating and mitigating in equipoise would invalidate sentencing procedures in States like *amicus* Arizona. Arizona places on the defendant the burden of proving that mitigating circumstances are sufficiently substantial to warrant leniency, a burden the Arizona Supreme Court has interpreted to require a showing that the mitigating circumstances outweigh the aggravating circumstances. *State v. Walton*, 159 Ariz. 571, 769 P.2d 1017 (1989), *aff'd*, 497 U.S. 639 (1990), *overruled, in part, on other grounds*, 536 U.S. 584 (2002); *see* Ariz. Rev. Stat. Ann. § 13-703(E). Arizona has a particularly strong interest here given that this Court has previously rejected an Eighth Amendment challenge to Arizona's system based on its failure to provide the kind of "tie-breaker" procedure found necessary by the court below. *Walton* v. *Arizona*, 497 U.S. 639 (1990), *overruled, in part, on other grounds, Ring* v. *Arizona*, 536 U.S. 584 (2002).

But the implications of the lower court's theory do not end there. By focusing on whether the mitigating and aggravating

circumstances are or are not in equipoise, the decision below implicitly holds (or at least assumes) that some "weighing" of mitigating and aggravating factors is constitutionally required. For if no such weighing is constitutionally necessary, it cannot possibly matter, for Eighth Amendment purposes, how the sentencer may view those factors in comparison to each other.

Thus, if the Kansas Supreme Court's approach were followed by this Court, it would cast serious doubt upon capital sentencing procedure in numerous States--including several *amici* --that do *not* currently require any weighing of aggravating and mitigating factors. *See, e.g.*, GA. CODE ANN. § 17-10-31; LA. CODE CRIM. PROC. ANN. art. 905.3; S.C. CODE ANN. § 16-3-20; S.D. CODIFIED LAWS § 23A-27A-2; TEX. PENAL CODE ANN. § 12.31; VA. CODE ANN. § 19.2-264.2; WASH REV. CODE § 10.95.070. Indeed, if the Court agrees with the lower court's conclusion that the Eighth Amendment forbids the death penalty when those factors are in "equipoise," the very existence of that requirement will likely require "non-weighing" States to change their capital sentencing schemes to require such weighing. And hundreds of death-row inmates who have been sentenced without such weighing will likely attack their sentences on that ground.

*Amici* States have a strong interest in preserving their ability to organize their capital sentencing procedures in a way that, while protecting defendants' legitimate constitutional and statutory rights, also serves the strong interests of their citizens in public safety and "[t]he interests ... of the victims whose rights [the States] must vindicate." *Johnson* v. *Texas*, 509 U.S. 350, 366 (1993). The States that do *not* currently use a "weighing" system similar to that used in Kansas have an obvious interest in preserving their ability to use procedures that they believe will better advance those purposes. On the other hand, States that currently use a system similar to Kansas' have a strong interest in preserving their systems intact, without being required to adopt the tie-



breaker procedure required by the decision below. And States with systems that currently comply with the Kansas Supreme Court's theory have a strong interest in preserving their legislatures' ability to modify their systems in the future.

## FACTS

In the decision below, by a 4-3 vote, the Kansas Supreme Court held the Kansas death penalty statute facially unconstitutional under the Eighth Amendment because it provides that a defendant convicted of capital murder "shall be sentenced to death" if the jury determines that the aggravating circumstances are "not outweighed by any mitigating circumstances." Pet. App. 17a-31a (quoting Kan. Stat. Ann. § 21-4624(e)). The majority found that this effectively directs the imposition of the death penalty if the sentencer determines that the aggravating and mitigating circumstances are evenly balanced. *Id.* at 19a-20a. Relying upon its earlier decision in *State v. Kleypas*, 40 P.3d 139, 223-32 (Kan. 2001), *cert. denied*, 537 U.S. 834 (2002), the majority held that, under the Eighth Amendment, the sentencer must reject the death penalty if it believes the aggravating and mitigating circumstances are "in equipoise." Pet. App. 17a-19a.

## SUMMARY OF ARGUMENT

The holding below--that the Kansas capital sentencing statute violates the Eighth Amendment because it permits the death penalty when aggravating and mitigating factors are in equipoise--rests upon an important but unstated premise. The premise is that some kind of weighing of aggravating and mitigating factors is itself required by the Eighth Amendment.

Both the holding and the premise, however, are foreclosed by a single principle reflected in decisions such as *Johnson* v. *Texas*, 509 U.S. 350 (1993). It is that the Eighth Amendment leaves it to the States to determine how, if at all, to "structure" or "channel" a sentencer's consideration of mitigating

circumstances--as long as the sentencer is "able to consider *in some manner* all of a defendant's relevant mitigating evidence." *Id.* at 359, 372-73. (emphasis added).

I. That principle clearly forecloses the assumption of the court below that the Eighth Amendment requires a sentencer to "weigh" mitigating and aggravating circumstances in some fashion. As the Court put it in *Buchanan* v. *Angelone*, 522 U.S. 269, 761 (1998), "we have never ... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id.* at 761-62. And the States' discretion over the structure of their capital sentencing schemes necessarily includes whether to "weigh" such evidence against evidence of aggravating circumstances and, if so, how. As the Court held in *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990), "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury" -- including being "weighed" against any mitigating circumstances presented by the defendant. *Accord Tuilaepa*, 512 U.S. at 980 (a "sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.") Moreover, allowing the States to choose for themselves *how* they will structure the sentencer's consideration of aggravating and mitigating circumstances comports with the language and history of the Eighth Amendment.

II. The *Johnson* principle likewise forecloses the holding of the court below that the Eighth Amendment requires a sentencer to reject the death penalty if the aggravating and mitigating circumstances are in equipoise. Again, all this Court's decisions require as to mitigating circumstances is that the sentencer be "able to consider" all relevant mitigating evidence "in some manner." 509 U.S. at 372. Just as States can satisfy that requirement without requiring any "weighing" of aggravating and mitigating circumstances, so also can they



do so without specifying precisely what the sentencer must do if, after weighing the aggravating and mitigating circumstances together, it finds that the two are equally balanced. As *Johnson*, *Buchanan* and other decisions confirm, the Eighth Amendment simply does not require more "structure" than this.

If there were any doubt about this conclusion, *Walton* eliminates it. The Arizona capital sentencing statute at issue there used a weighing provision by which death was imposed if the mitigating circumstances did not outweigh the aggravating circumstances, or if the mitigating circumstances were not "sufficiently substantial to call for leniency." Ariz.Rev.Stat.Ann. § 13-703(E). The Court began by holding that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Walton*, 497 U.S. at 652, *quoting Blystone*, 494 U.S. at 307. The Court then concluded that, "so long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged ... a defendant's constitutional rights are not violated by placing on *him* the burden of proving mitigating circumstances *sufficiently substantial to call for leniency*. *Walton*, 497 U.S. at 650 (emphasis added).

Obviously, the Court's use of the phrase "sufficiently substantial to call for leniency" is equivalent to saying, in the context of Arizona's weighing system, that the mitigating circumstances are not sufficient to "outweigh" the aggravating circumstances. And that clearly implies that, if the aggravating and mitigating circumstances are in some sense "in equipoise," the sentencer is free to impose the death penalty.

## ARGUMENT

As shown below in Section I, the Kansas Supreme Court was wrong to assume that the Eighth Amendment requires that a sentencer engage in some kind of weighing of mitigating and aggravating factors in determining whether to impose the death penalty. Section II shows that, even if a State chooses to adopt such a weighing procedure, the Eighth Amendment does not require that the sentencer reject the death penalty if it finds that the mitigating and aggravating factors are in equipoise.

### I. Contrary to the Kansas Supreme Court's assumption, the Eighth Amendment requires no weighing of mitigating and aggravating factors.

Although this Court requires that State sentencing procedures allow mitigating factors to be *considered*, it has never placed on States a requirement that mitigation evidence be *weighed* against aggravating factors, and has held to the contrary on several occasions. To impose such a requirement would go well beyond the requirements of the Eighth Amendment under any reasonable understanding of its text and history.

#### A. This court has not previously required States to weigh mitigating and aggravating factors, but has instead allowed States to decide for themselves how such evidence is considered.

As this Court's death penalty jurisprudence stands today, State sentencing statutes must satisfy only two requirements. First, a sentencer's discretion to impose the death penalty "must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Zant* v. *Stephens*, 462 U.S. 862, 874 (1983) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 189 (1976)). This step serves to "narrow" the class of defendants who are *eligible* for the



death penalty. *Tuilaepa* v. *California*, 512 U.S. 967 (1994) (noting that an aggravating circumstance "may not apply to every defendant convicted of murder; it must apply only to a subclass of defendants convicted of a murder"). Second, a sentencer must be allowed to consider, and give effect to, any mitigating evidence. *Buchanan* v. *Angelone*, 522 U.S. 269, 276 (1998); *Tuilaepa*, 512 U.S. at 972. That is, it must be given discretion to make an "individualized determination" about the appropriate punishment based on the defendant's "character" and "record." *Johnson*, 509 U.S. at 360; *Tuilaepa*, 512 U.S. at 972.

This Court, however, has been careful not to create additional restrictions on the States' legitimate interests in structuring their death penalty statutes to reflect their unique policies and traditions. As the Court put it in *Buchanan*, "we have never ... held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." 522 U.S. at 276.

That principle, moreover, necessarily includes whether to "weigh" such evidence against evidence of aggravating circumstances and, if so, how. As the Court put it in *Blystone v. Pennsylvania*, 494 U.S. 299, 306-07 (1990), "[t]he presence of aggravating circumstances serves the purpose of limiting the class of death-eligible defendants, and the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." See also *Tuilaepa*, 512 U.S. at 979 (a "sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.").

In *Zant*, for example, the Court examined Georgia's capital punishment statute, which allowed a jury to impose the death penalty if it found, beyond a reasonable doubt, that one of several aggravating factors existed. 462 U.S. at 865-66. The jury in that case also was instructed that it could consider "all of the evidence received during the trial as well as all facts and circumstances presented in . . . mitigation." *Id.*

However, as the Court made clear, the jury had complete discretion to withhold the death penalty based on mitigation factors, regardless of the weight it accorded to such evidence. *Id.* at 871. "In Georgia, unlike some other States, the jury is not instructed . . . to balance aggravating against mitigating circumstances pursuant to any special standard." *Id.* at 873-74 (footnote omitted). But the Court rejected the argument that Georgia violated the Eighth Amendment by giving the jury "unbridled discretion" whether to consider mitigating evidence after determining that a defendant was eligible for the death penalty. It found Georgia's statute constitutional "even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances." *Id.* at 875 (citing *Gregg* v. *Georgia*, 428 U.S. 153, 196-97 (1976), and refusing to overrule that decision which also upheld Georgia's sentencing statute).

More recently, in *Buchanan* v. *Angelone*, the Court examined Virginia's capital sentencing statute which, like Georgia's, required the State to prove beyond a reasonable doubt that at least one aggravating factor existed. 522 U.S. at 272. Under that system, the jury was simply instructed that it "may fix the punishment of the Defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." *Id.* at 272-73. There was no explicit instruction on mitigating factors. Yet the Court rejected the defendant's argument that the trial court violated the Eighth Amendment by failing to "instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." *Id.* at 275. The Court concluded that the State's procedures comported with the Eighth Amendment because the State permitted the jury to consider all mitigating evidence and did not "constrain the manner in which the jury was able to give effect" to such factors. *Id.* at 277.



The principle underlying all these decisions is that the Eighth Amendment leaves it to the States to determine how, if at all, to "structure" or "channel" a sentencer's consideration of mitigating circumstances. At one extreme, "the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found that the defendant is a member of the class made eligible for that penalty.'" *Tuilaepa*, 512 U.S. at 979-980 (quoting *Zant*, 426 U.S. at 875). Alternatively, the State can choose to channel the sentencer's discretion by, for example, specifying the statutory criteria to which a particular mitigating factor is relevant. *Johnson*, 509 U.S. at 372. Under this Court's decisions, all the Eighth Amendment requires is "that a jury be able to consider *in some manner* all of a defendant's relevant mitigating evidence." *Id.* (emphasis added).

If, in the face of this authority, this Court were to rule in favor of the respondent and require the kind of "equipoise" procedure that the Kansas Supreme Court did, it would imply that a weighing of mitigating and aggravating factors is constitutionally required and, in the process, cast doubt on the vast majority of State death penalty statutes that do not require such balancing. At least 10 of the 35 States that have adopted capital punishment do not require any weighing of mitigating and aggravating circumstances. *Thirty-Second Annual Review of Criminal Procedure*, 91 GEO. L. J. 717, 728 n.2259 (2003); Ingrid A. Holewinski, *"Inherently Arbitrary and Capricious": An Empirical Analysis of Variations Among State Death Penalty Statutes*, 12 CORNELL J.L. & PUB. POL'Y 231, 239 (2003); Russell Dean Covey, *Exorcizing Weschsler's Ghost: The Influence of the Model Penal Code on Death Penalty Sentencing Jurisprudence*, 31 HASTINGS CONST. L.Q. 189, 222 n.175 (2004).[1]

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[1] The lists of "non-weighing" states compiled in these law review articles are not entirely consistent with each other, as a few statutes can be categorized differently depending on the definition of weighing. But there is no doubt that a substantial number of States currently require no

Adoption of the Kansas Supreme Court's assumption would therefore force these States to re-write their capital punishment procedures and would place into question numerous death penalty sentences across the country. As we have shown, however, that assumption is flatly contrary to the principle that the Eighth Amendment leaves to the States the authority to determine how, if at all, to structure the sentencer's consideration of mitigating and aggravating circumstances, as long as the sentencer is allowed to consider all mitigating evidence "in some manner." *Id.*

### B. In its original meaning, the Eighth Amendment did not require any consideration of mitigating evidence and, hence, any balancing of that evidence against aggravating factors.

An additional reason not to impose a balancing or weighing requirement is that no reasonable reading of the text and history of the Eighth Amendment supports it. We recount that history briefly, not to call for the overruling of any of this Court's prior decisions, but to urge the Court not to read those precedents as imposing *additional* restrictions on the States' management of their sentencing processes.

1. The Eighth Amendment, as originally understood, had no bearing at all on the process by which States determine what punishments to impose. The Eighth Amendment in its entirety reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." Thus, the text speaks only to the *end result* of a prosecution, i.e., the punishment actually imposed, and not to the *process* by which the punishment is determined. See, *e.g.*, *Harmelin* v. *Michigan*, 501 U.S. 957, 978 (1991) (opinion of

weighing of aggravating and mitigating circumstances. Moreover, states such as South Dakota, though listed as weighing states in some of the aforementioned law review articles, in fact have non-weighing statutes. *See* S.D. CODIFIED LAWS §§ 23A-27A-2—23A-27A-4.



Scalia, J., in which Rehnquist, C.J., joined) (providing a detailed analysis of the evidence reflecting the original intent of the Cruel and Unusual Punishments clause and concluding that the clause merely prohibits certain "*modes* of punishment") (emphasis in original).[2]

The historical evidence confirms what the text clearly shows, i.e., that it was only the method or mode of punishment, and nothing more, that the Eighth Amendment was intended to limit. Adopted verbatim from the English Bill of Rights of 1689, the Cruel and Unusual Punishments

[2] *See also Roper* v. *Simmons*, 125 S. Ct. 1183, 1218 n.1 (2005) (Scalia, J., dissenting); *Weems* v. *United States*, 217 U.S. 349, 383-411 (1910) (White, J., dissenting); Jeffrey D. Bukowski, *The Eighth Amendment and Original Intent: Applying the Prohibition Against Cruel and Unusual Punishments to Prison Deprivation Cases is Not Beyond the Bounds of History and Precedent*, 99 DICK. L. REV. 419, 421-422 (1995) ("There is little doubt that the original drafters of the Eighth Amendment's prohibition against cruel and unusual punishments were primarily concerned with the use of tortures and other barbarous methods of punishment."); Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 840-42 (1969) ("Expressions in the first congress confirm the view that the cruel and unusual punishments clause was directed at prohibiting certain methods of punishment."); Note, *The Cruel and Unusual Punishments Clause and the Substantive Criminal Law*, 79 Harv. L. Rev. 635, 636-37 (1966) ("it was unusual cruelty in the *method* of punishment that was condemned") (emphasis in original).

Even assuming *arguendo* that the Cruel and Unusual Punishments clause also contains a proportionality guarantee, i.e., that the punishment be proportional to the crime, such a guarantee would not necessitate the consideration of mitigating factors at a post-conviction penalty phase. The crime to which a punishment would be made proportional is the act which the defendant is declared to have committed when he is convicted during the *trial* phase. Mitigating factors presented *after* conviction are, by their very nature, not for consideration in the conviction phase, and thus would have no relevance to whether the punishment is proportional to the crime itself. *See California* v. *Ramos*, 463 U.S. 992, 1007-08 (1983) (explaining that the penalty phase, unlike the determination of guilt, allows for "countless considerations" to determine if the punishment is appropriate to the individual defendant rather than whether the punishment is appropriate to the crime).

clause was first introduced into the Virginia state constitution by George Mason in 1776. Granucci, *supra*, at 839-40. The clause was eventually adopted by eight other states and included in the federal government's Northwest Ordinance of 1787 before it became the Eighth Amendment in 1791. *Id.* at 840.

Before the proposal or adoption of the federal Bill of Rights, however, the absence of any limitation on Congress' punishment-creating ability became a source of discussion during the debates over the ratification of the Constitution. For example, during the Massachusetts convention of January, 1788, a certain Mr. Holmes asked:

> What gives an additional glare of horror to these gloomy circumstances is the consideration that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that *racks* and *gibbets* may be amongst the most mild instruments of their discipline.

2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. 1881) (emphasis in original). That statement was obviously an objection to the lack of limits on the *methods* by which Congress might impose punishments, not to the lack of *procedures* by which to determine which method of punishment was appropriate.

Similarly, during the Virginia ratification convention, Patrick Henry expressed concern whether the new constitution "would not admit of tortures, or cruel and barbarous punishment." 3 ELLIOT, *supra*, at 447-48. He apparently thought the Virginia Bill of Rights, adopted in 1776, lacked such a protection as well. To this George Mason replied that



> the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture; for... [a]nother clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition.

*Id.* at 452 (emphasis added). The provision that was later proposed as the Eighth Amendment, of course, mirrored the same provision in the Virginia Bill of Rights. Thus, as Chief Justice Burger observed, "The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that *the Framers' exclusive concern was the absence of any ban on tortures*." *Furman* v. *Georgia*, 408 U.S. 238, 377 (1972) ( Burger, C.J., dissenting) (emphasis added).

The attitudes expressed by the first Congress also are persuasive evidence of the original understanding of the Constitution's provisions. *Harmelin*, 501 U.S. at 980 (opinion of Scalia, J.); *Marsh* v. *Chambers*, 463 U.S. 783, 788-790 (1983). Here, too, the emphasis was on prohibiting certain methods of punishment:

> Mr. LIVERMORE. -- The [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.

1 ANNALS OF CONG. 782-83 (1789). Despite such objections to the wisdom of the amendment (focused as it was on methods of punishment), "it was agreed to by a considerable majority." *Id.*[3]

Early cases interpreting the Eighth Amendment also focused on the mode or method of punishment. *Furman*, 408 U.S. at 421-22 (Powell, J., dissenting). For example, in *In re Kemmler*, 136 U.S. 436, 444, 447 (1890), Chief Justice Fuller, speaking for a unanimous Court, explained that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." 136 U.S. at 447. Thus, "[t]he Court drew a clear line between the penalty itself and the mode of its execution." *Furman*, 408 U.S. at 422 (Powell, J., dissenting). See also *Wilkerson* v. *Utah*, 99 U.S. 130, 137 (1879); *Harmelin*, 501 U.S. at 982-84 (citing, *inter alia*, *Aldridge* v. *Commonwealth*, 4 Va. 447, 449-50 (1824)).

In short, as the Chief Justice has pointed out, under the original understanding, "the prohibition against cruel and unusual punishment contained in the Eighth Amendment [asks only whether t]he *punishment* . . . is . . . cruel and unusual ..." *Woodson* v. *North Carolina*, 428 U.S. 280, 323-24 (1976) (Rehnquist, J., dissenting). In other words, "[t]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed." *Gardner* v. *Florida*, 430 U.S. 349, 371 (1977)

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[3] Moreover, "[t]he early commentary on the Clause . . . again indicates that it was designed to outlaw particular *modes* of punishment." *Harmelin*, 501 U.S. at 981 (opinion of Scalia, J.) (emphasis in original) (citing J. BAYARD, A BRIEF EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES 154 (2d ed. 1840); 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1896 (1833); B. OLIVER, THE RIGHTS OF AN AMERICAN CITIZEN 186 (1832); 2 J. KENT, COMMENTARIES ON AMERICAN LAW 10-11 (1827)).



(Rehnquist, J., dissenting). *See also Harmelin*, 501 U.S. at 965-985 (opinion of Scalia, J.).

2. This Court departed to some extent from that reading of the Eighth Amendment in *Furman* v. *Georgia*, 408 U.S. 238 (1972), which held that States must adopt *some* procedures sufficient to ensure a narrowing of the class of persons convicted of murder who are eligible for the death penalty. Specifically, the Court deemed unconstitutional capital sentencing procedures in Georgia and Texas that placed complete discretion in juries to impose death for various crimes. *Id.* at 240 (Douglas, J., concurring). That discretion was characterized as giving rise to "cruel and unusual punishment" because of the arbitrariness such discretion created. Justice Stewart reasoned:

> These death sentences are cruel and unusual in the same way that being struck by lightening is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

*Id.* at 309-10 (footnotes omitted) (concurring opinion). *See also id.* at 313 (White, J., concurring) (stating that the "death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

Neither the language and history of the Eighth Amendment nor the rationale underlying *Furman*, however, suggests that the phrase "cruel and unusual punishment" requires that mitigating factors be part of the sentencing process. As

Justice Scalia noted in *Walton*, the phrase "unusual punishment" can reasonably be read to mean "a traditional form of punishment that is rarely imposed." 497 U.S. at 670 (concurring in part and concurring in the judgment). But under this reading of the text, States could satisfy any procedural demands the Amendment may impose, and satisfy *Furman*, merely by limiting or "narrowing" the death penalty to a well-defined set of crimes. *Roberts* v. *Louisiana*, 428 U.S. 325, 339 (1976) (White, Burger, Blackmun, and Rehnquist, JJ., dissenting) (finding a mandatory death penalty statute to be consistent with the Eighth Amendment); *Woodson* v. *North Carolina*, 428 U.S. 280, 313 (1976) (Rehnquist, J., dissenting) (same). *See also Graham* v. *Collins*, 506 U.S. 461, 487 (1993) (Thomas, J., concurring) (noting that a "mandatory death penalty scheme [is] a perfectly reasonable legislative response to the concerns expressed in *Furman*); *Walton*, 497 U.S. at 671 (Scalia, J., concurring in part and concurring in the judgment) (stating that a mandatory death sentence is not "unusual" because it would not be "rarely" imposed).

In short, even under a fairly expansive reading of the Eighth Amendment, the "'narrowing' requirement" is the "only special capital sentencing procedure that the Eighth Amendment demands." *Espinosa* v. *Florida*, 505 U.S. 1079, 1083 (1992) (Scalia, J., dissenting). It follows that, under this reading, the Eighth Amendment "does not require any consideration of mitigating evidence." *Sochor* v. *Florida*, 504 U.S. 527, 553-554 (1992) (Scalia, J., concurring in part and dissenting in part).

*Amici* States recognize that, since *Furman,* a majority of this Court has expanded its view of the Eighth Amendment to require that juries also consider mitigating evidence. *E.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Eddings* v. *Oklahoma,* 455 U.S. 104, 113-115 (1982). This case does not require the Court to reconsider that conclusion. If this Court affirms the decision below, however, and extends this line of



cases to require that mitigation evidence be weighed against aggravating factors, it would further remove its death penalty jurisprudence from the Amendment's original understanding as well as the interpretation of the Amendment in *Furman*.

Such a dramatic extension of the *Lockett-Eddings* line of cases, moreover, would upset the careful balance this Court has struck between protecting the constitutional rights of defendants and recognizing the States' important interests in maintaining a right to manage their own affairs. As noted in *Johnson* v. *Texas*, States should be "free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" 509 U.S. at 362 (citing *Boyde* v. *California*, 494 U.S. 370, 377 (1990)). Upholding the Kansas Supreme Court's decision, and thereby imposing a "weighing" requirement on all the States, would render this aspect of State sovereignty virtually meaningless.

## II. If a State chooses to engage in a weighing of mitigating and aggravating factors, nothing in the Eighth Amendment or this Court's decisions requires a state also to specify that the sentencer must reject capital punishment if it believes the aggravating and mitigating circumstances are "in equipoise."

Some States, like Kansas and Arizona, have of course chosen to have sentencing juries weigh aggravating and mitigating circumstances in some fashion. But that choice does not mean the State must then require that a sentencer reject the death penalty if it finds that the aggravating and mitigating factors are in some sense in equipoise. Indeed, if, as we have already established, the Eighth Amendment does not require weighing in the first instance, it cannot require that aggravation somehow "outweigh" mitigation.

Petitioner's brief provides a comprehensive explanation of why the Kansas Supreme Court's analysis of this point was incorrect, and we will not repeat that analysis here. However,

we wish to emphasize two dispositive points. First, this issue is controlled by such decisions as *Johnson*, which make clear that the Eighth Amendment imposes no procedural requirements as to the consideration of mitigating evidence other than that the jury must be allowed to consider it as a basis for rejecting the death penalty. And second, this Court's decision in *Walton*, which is a special case of the *Johnson* principle, makes crystal clear that the Kansas capital sentencing system is not unconstitutional by virtue of its failure to require the sort of "equipoise" procedure that the Kansas Supreme Court thought necessary to comply with the Eighth Amendment.

**A. This case is controlled by the general principle articulated in *Johnson* that the Eighth Amendment leaves the States with discretion to structure the consideration of mitigating circumstances in any way that allows a jury to consider those circumstances "in some manner."**

As discussed earlier, the issue of whether a State must have the sentencer conduct a weighing of mitigating evidence against aggravating evidence is controlled by the principle applied in such decisions as *Johnson, Tuilaepa,* and *Buchanan*: under the Eighth Amendment a State need not "structure in a particular way the manner in which juries consider mitigating evidence" (522 U.S. at 276) as long as the jury is able to consider that evidence "in some manner." *Johnson*, 509 U.S. at 372. That principle is equally dispositive of the issue whether the Eighth Amendment also requires rejection of the death penalty if the sentencer finds that the aggravating and mitigating circumstances are "in equipoise."

The principle articulated in these decisions is by no means an aberration in this Court's jurisprudence. Several years prior to *Johnson,* the Court in *Zant* had held that "the Constitution does not require a State to adopt specific



standards for instructing the jury in its consideration of aggravating and mitigating circumstances." 462 U.S. at 890. And more recently, in *Franklin* v. *Lynaugh*, 487 U.S. 164, 179 (1988), the Court noted that "we have never held that a specific method for *balancing* mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." These were forerunners of the general principle that a State is free to structure the sentencing proceeding in any way that allows the sentencer to "consider" the mitigating evidence "in some manner." *Johnson*, 509 U.S. at 372.

That principle, moreover, is rooted in a deeper concern about intrusion into the States' management of their capital jury trials. In keeping with that concern, the Court has repeatedly warned against "micromanagement" of State capital sentencing procedures under the Eighth Amendment. *See, e.g., Harris v. Alabama*, 513 U.S. 504, 512 (1995).

The Kansas Supreme Court flatly violated these principles in holding that the Eighth Amendment requires a capital sentencer to reject the death penalty if it finds the aggravating and mitigating circumstances in equipoise. To require such a result under the aegis of the Eighth Amendment is to require the States to structure the consideration of mitigating circumstances in a "particular way" -- i.e., in a way that results in rejection of the death penalty if the sentencer fails to find that the aggravators "outweigh" the mitigators. *Buchanan*, 522 U.S. at 276. Where it applies, such a requirement is indeed "a specific method for balancing mitigating and aggravating circumstances." *Franklin*, 487 U.S. at 179. And where the sentencer is a jury, such a requirement is also a "specific standard[] for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant,* 462 U.S. at 890. For all these reasons, such a requirement goes well beyond simply allowing the

sentencer to "consider" the mitigating circumstances "in some manner." *Johnson*, 509 U.S. at 372.[4]

**B. *Walton*, which is simply an application of the *Johnson* principle, leaves no doubt as to the constitutionality of Kansas' capital sentencing scheme.**

If there were any doubt as to the error of the Kansas Supreme Court's holding under the principle announced in *Johnson* and its predecessors, *Walton* eliminates it. Indeed, *Walton* can best be thought of as a specific application of the *Johnson* principle.

1. *Walton* examined the constitutionality of Arizona's capital sentencing statute, which uses a weighing provision by which death is imposed if the mitigating circumstances do not outweigh the aggravating circumstances, or if the mitigating circumstances are not "sufficiently substantial to call for leniency." Ariz.Rev.Stat.Ann. § 13-703(E). The plurality determined that this statute satisfied the narrowing requirement of the Eighth Amendment because it allowed a death sentence if the sentencer "finds one or more of the aggravating circumstances enumerated . . . and that there are

[4] As petitioner explains in detail, moreover, the Kansas Supreme Court's decision envisions a situation--a sentencer feeling that the aggravating and mitigating circumstances are in equipoise--that is extremely unlikely in practice. Indeed, that concern assumes a level of precision in sentencing deliberations that simply does not exist. Because there is no requirement that a jury give any specific weight to any particular type of mitigation, and because there is no logical way to ascribe a specific weight to any mitigating factor, a requirement that requires a precise "sum" of the combined aggravating evidence--which can then be weighed against some "sum" of the mitigation evidence--is meaningless. Even if a state were to specify that aggravation must outweigh mitigation by at least one percent, because neither mitigation nor aggravation can be specifically quantified, in reality such a standard would still mean nothing more than that the sentencer must "consider aggravation and mitigation and decide if the death penalty is warranted."



no mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 644. The plurality thus rejected the argument that Arizona's capital sentencing statute creates an "unconstitutional presumption" of death. *Id.* at 651-52.

The Kansas Supreme Court attempted to evade the *Walton* holding by relying upon the fact that no single opinion commanded a majority of the Court. Pet. App. 21a. What the court ignored, however, is that Justice Scalia, who provided the critical fifth vote, also squarely rejected the defendant's "presumption of death" argument, albeit on different grounds. He concluded that the Arizona statute was constitutional because, in his view, the Eighth Amendment requires no consideration of mitigating circumstances at all. *Walton*, 497 U.S. at 670-73 (Scalia, J., concurring in judgment). But there is no doubt that Justice Scalia had the "presumption of death" argument in mind, inasmuch as (a) he expressly rejected the defendant's "claim that in two respects the Arizona procedure deprived the sentencer of discretion to consider all mitigating circumstances," *id.* at 674 (Scalia, J., concurring in judgment); and (b) the "presumption of death" argument was one of the two specific mitigation issues that the plurality addressed. Thus, there can be no doubt that a majority of this Court squarely addressed and rejected the "presumption of death" argument on the merits.

Moreover, as petitioner explains, it would have made no sense for the Court to avoid that issue because it was the subject of an existing conflict between the Arizona Supreme Court's decision upholding the statute in *State* v. *Walton*, 769 P.2d 1017 (Ariz. 1989), and the Ninth Circuit's decision declaring the same statute unconstitutional in *Adamson* v. *Ricketts*, 865 F.2d 1011 (9th Cir. 1988). The majority in *Adamson* had held that the statute "impermissibly places the burden on the defendant to prove the existence of mitigating circumstances sufficiently substantial to merit leniency, thereby imposing a presumption that death is the appropriate penalty." *Adamson*, 865 F.2d at 1039. Such a presumption,

according to the Ninth Circuit, hindered the "individualized consideration" of mitigating circumstances that the Eighth Amendment requires. *Id.*

The *Walton* plurality squarely rejected this argument. The Court reiterated its earlier holdings that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence." *Walton*, 497 U.S. at 652, *quoting Blystone*, 494 U.S. at 307. The Court further noted that "[t]here is no . . . constitutional requirement of unfettered sentencing discretion in the jury," and that "States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Walton*, 497 U.S. at 652, *quoting Boyde*, 494 U.S. at 377. The Court then concluded that, "[s]o long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, ...a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances *sufficiently substantial to call for leniency." Walton*, 497 U.S. at 650.

The Court's use of the phrase "sufficiently substantial to call for leniency" is equivalent to saying, in the context of Arizona's "weighing" system, that the mitigating circumstances, alone or in combination, are not sufficient to "outweigh" the aggravating circumstances. And that clearly implies that, if the aggravating and mitigating circumstances are in some sense "in equipoise," the jury is free to impose the death penalty. Thus, *Walton* squarely addressed and rejected the "presumption of death" argument relied upon by the court below.

2. . Settled principles of *stare decisis* counsel strongly against any departure from *Walton*. As a unanimous Court put it in *United States* v. *IBM*, 517 U.S. 843 (1996), *stare decisis* "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial



decisions, and contributes to the actual and perceived integrity of the judicial process." *Id.* at 856. Thus, "[e]ven in constitutional cases, the doctrine carries such persuasive force that we have always required a departure from precedent to be supported by some 'special justification.'" *Id.*

No such "special justification" exists here. There is no evidence, for example, that *Walton* has proven unworkable. *Cf.*, *e.g.*, *id.* at 856, *Payne* v. *Tennessee*, 501 U.S. 808, 827 (1991). Moreover, although no single opinion commanded a majority in *Walton*, neither the plurality nor the concurrence can be said to have been "badly reasoned." *Id.*; *United States* v. *IBM*, 517 U.S. at 856.

On the other hand, several States have relied upon *Walton* in their decision not to require sentencing juries to reject the death penalty if they believe the aggravating and mitigating circumstances are in equipoise. Those include not only Arizona, whose capital sentencing regime was at issue in *Walton*, and Kansas, whose capital sentencing regime is at issue here, but a handful of other States as well. *See, e.g.*, COLO. REV. STAT. § 18-1.3-1201(2)(a) (2004); FLA. STAT. § 921.141(2)(b), (3)(b) (2005); MISS. CODE ANN. § 99-19-101(2)(c), (3)(c) (2005); NEV. REV. STAT. § 175.554(3) (2004); N.C. GEN. STAT. § 15A-2000(b)(2), (c)(3) (2004).[5] In

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[5] Indeed, since *Furman*, many of the "weighing" states adopted, and have long since relied upon, sentencing procedures under which a murderer must establish that mitigation outweighs aggravation to avoid a death sentence. This Court has repeatedly cited statutory language, state judicial constructions, closing arguments, and jury instructions referring to the defendant's burden to demonstrate that mitigation "outweighs" aggravation. See, *e.g.*, *Brown* v. *Payton*, -- U.S. --, 125 S. Ct. 1432, 1447 (2005) (jury instructed, "[I]f you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole."); *Wiggins* v. *Smith*, 539 U.S. 510, 537 (2003) (citing Maryland case holding that "as long as a single juror concludes that mitigating evidence outweighs aggravating evidence, the death penalty cannot be imposed"); *Bell* v. *Cone*, 535 U.S. 685, 691 (2002) (citing

addition, several courts have relied on *Walton* in rejecting the argument that the Eighth Amendment prohibits a state from placing the burden on the capital defendant to prove mitigation. *See Richmond* v. *Lewis*, 948 F.2d 1473, 1481 (9th Cir. 1990), *rev. on other grounds*, 506 U.S. 40 (1992) (rejecting claim that Arizona's statutory presumption was unconstitutional, noting that "*Walton* v. *Arizona* specifically addressed and rejected" the claim); *State* v. *Ross*, 646 A.2d 1318, 1352 (Conn. 1994); *State* v. *Hoffman*, 851 P.2d 934, 943 (Idaho 1993).[6]

As this Court observed in *Payne*, the demands of *stare decisis* are "at their acme . . . where reliance interests are involved." 501 U.S. at 828. Those demands acquire even greater force in the capital punishment context because, as the Court noted in *Johnson*, "[t]he interests of the State[s] . . . and of the victims whose rights [they] must vindicate, ought not to be turned aside when the State relies upon an interpretation of the Eighth Amendment approved by this Court." 509 U.S. at 366. For all these reasons, the Court should adhere to *Walton*.

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Tennessee law providing that "a death sentence was required if the jury found unanimously that the State proved beyond a reasonable doubt the existence of at least one statutory aggravating circumstance that was not outweighed by any mitigating circumstance.").

[6] Courts have also rejected the corresponding argument that the Constitution requires a presumption of life at the penalty phase of a capital sentencing. *Smallwood* v. *Gibson*, 191 F.3d 1257, 1271 (10th Cir. 1999) ("petitioner has failed to cite any judicial authority, and our independent research revealed none, that the Constitution mandates a 'presumption of life' instruction"); *People* v. *Combs*, 101 P.3d 1007, 1038 (Cal. 2004); *Brown* v. *State*, 890 So.2d 901, 920 (Miss. 2004); *State* v. *Langley*, 711 So.2d 651, 667 (La. 1998); *Davie* v. *Mitchell*, 291 F.Supp.2d 573, 622 (N.D. Ohio 2003); *Slaughter* v. *Parker*, 187 F.Supp.2d 755, 815 (W.D. Ky. 2001).



## CONCLUSION

The judgment of the Supreme Court of Kansas should be vacated and the case remanded for further proceedings.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

*vs.*

MICHAEL LEE MARSH, II,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of the State of Kansas**

## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## QUESTIONS PRESENTED

1) Does it violate the Constitution for a state capital sentencing statute to provide for the imposition of the death penalty when the sentencing jury determines that the mitigating and aggravating evidence is in equipoise?

2) Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. § 1257, as construed by *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975)?

3) Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

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IN THE

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STATE OF KANSAS,

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MICHAEL LEE MARSH, II,

*Respondent*.

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## BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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## INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The decision below invalidates Kansas' death penalty based upon a misinterpretation of the Eighth Amendment. The court held that the possibility that a jury may impose death when the aggravating and mitigating factors are equal is inconsistent with

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

this Court's Eighth Amendment jurisprudence. If upheld, this misinterpretation of the Constitution could threaten capital punishment in other states as well as Kansas. This erroneous interpretation frustrates the wishes of Kansas' citizens in seeing their moral priorities vindicated through the criminal justice system. In addition, it may lead to the loss of innocent lives. This threat to public safety and the integrity of a state's criminal justice system is contrary to the interests that CJLF was formed to protect.

## SUMMARY OF FACTS AND CASE

On June 17, 1996, Michael Lee Marsh, the defendant, murdered Marry Ane Pusch and her 19-month-old daughter, Marry Elizabeth Pusch (M.P.), in their home in Wichita, Kansas. *State* v. *Marsh*, 278 Kan. 520, 525, 102 P. 3d 445, 452 (2004). Marry was shot in the head and was stabbed in the heart. See *ibid.* The house was burned down. M.P. was severely burned and died six days later. See *id.*, at 525-526, 102 P. 3d, at 452. Marsh confessed to shooting Marry and abandoning M.P. after he fled the residence. See *id.*, at 526, 102 P. 3d, at 452. Marsh sought to submit circumstantial evidence tying Marry's husband to the crimes, but the trial court refused because the state's evidence against Marsh was direct. See *ibid.*

A jury convicted Marsh of the capital murder of M.P., first-degree murder of Marry, aggravated burglary, and aggravated arson, and the jury found three aggravating circumstances. *Id.*, at 527, 102 P. 3d, at 453; see Kan. Stat. Ann. §§ 21-4625(2), (5), (6). Marsh was sentenced to death for murdering M.P., life with a minimum term of 40 years for Marry's murder, 51 months for aggravated arson, and 34 months for aggravated burglary. See 278 Kan., at 525, 102 P. 3d, at 452.

While Marsh's appeal was pending, the Kansas Supreme Court decided that the Kansas death penalty statute as written could violate the Eighth Amendment, because it would allow



a death sentence to be imposed where the aggravating and mitigating factors were equal. See *State* v. *Kleypas*, 272 Kan. 894, 1015-1016, 40 P. 3d 139, 232 (2001). The *Kleypas* Court did not strike the Kansas death penalty law, but instead allowed trial courts to avoid this supposed defect through jury instructions that changed the wording of the statute. See *id.*, at 1018, 40 P. 3d, at 233-234.

In the present case, the majority reaffirmed the first holding of *Kleypas*, rejecting the dissenters' contention that this Court had resolved the question in *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584 (2002). See *Marsh*, 278 Kan., at 536-537, 102 P. 3d, at 458-459. The Kansas Supreme Court then went on to overrule the second holding of *Kleypas*. The court held that the Kansas death penalty law could not be construed to avoid the purported Eighth Amendment violation and struck down the state's death penalty. See *id.*, at 544, 102 P. 3d, at 464. The Kansas Supreme Court also reversed Marsh's conviction for murdering M.P., because the trial court erroneously excluded circumstantial evidence that tied the husband to the crimes. See *id.*, at 533, 102 P. 3d, at 456-457. It affirmed the convictions and sentence for aggravated burglary and the murder of Marry, but ordered a new trial on the capital murder and aggravated arson counts. *Id.*, at 548, 102 P. 3d, at 466. This Court granted certiorari on May 31, 2005, adding two jurisdictional questions, as described in Parts I and II, *infra*.

## SUMMARY OF ARGUMENT

While the decision below does not fit the literal definition of final judgment, under *Cox Broadcasting Corp.* v. *Cohn*, there is a final judgment in the present case because the Eighth Amendment issue cannot be reviewed in the subsequent state proceedings. Kansas procedure effectively prevents the state from raising the Eighth Amendment issue upon Marsh's retrial. The fact that the Eighth Amendment question was not raised in

the state's brief in the Kansas Supreme Court does not change this analysis because the federal constitutional holding of the *Kleypas* decision was vigorously contested by the dissents and reaffirmed by the majority in the decision below.

The judgment in this case does not rest on independent state grounds. Since the state court did not decide the Eighth Amendment issue on procedural default grounds that doctrine does not apply. While the severability of a statute is a state-law issue, the invalidity of a part of the state law is a federal issue and is a prerequisite to the severability issue.

Kansas' equipoise provision does not violate the Eighth Amendment. While the Eighth Amendment requires individualized sentencing, this does not prevent a state from structuring how the jury considers the mitigating evidence. So long as the defendant can present his mitigating evidence and the sentencer considers it, the formula for decision is a matter of state law.

The decision below cannot be squared with this Court's precedents. First, it mistakes the sentencing phase for the trial on guilt even though they involve very different types of decisions. It also fails to recognize that placing a reasonable doubt burden on the prosecution for the ultimate sentencing question benefits capital defendants far more than any incidental harm from the equipoise provision. The equipoise provision would be constitutional even without the reasonable doubt requirement, as it is appropriate to make the defendant prove his case for mitigation after the state has proven beyond a reasonable doubt that he is eligible for capital punishment.

The continuing creation of new rules governing capital sentencing is causing more harm than good. The instability of the law causes arbitrary removal of murderers from death row for reasons having nothing to do with their culpability.



## ARGUMENT

### I. The decision in this case is final and draws in question the validity of a statute within the meaning of *Cox Broadcasting*.

In its order granting the petition for writ of certiorari, this Court directed briefing on two additional questions. The first is, "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. Sec. 1257, as construed by the *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975)?" *Cox Broadcasting* addressed two jurisdictional questions, the "drawn in question" requirement of former 28 U. S. C. § 1257(2) and the "final judgment" requirement of the same statute. The subsection involved in that case governed jurisdiction on appeal and has since been repealed. See Pub. L. 100-352, § 5, 102 Stat. 662 (1988). The two phrases at issue in *Cox Broadcasting* survive, however, in the present certiorari statute.

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court by writ of certiorari . . . where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States . . . ." 28 U. S. C. § 1257(a).

#### *A. Final Judgment.*

Under a literal interpretation of the word, the decision of the Kansas Supreme Court would not be a "final judgment" because the case is remanded for retrial of the capital murder charge. See *State* v. *Marsh*, 278 Kan. 520, 548, 102 P. 3d 445, 466 (2004). *Cox Broadcasting* did not take such a literal view, however. The Court identified four categories of cases in which judgments may be treated as final despite the fact that further proceedings are in order. See 420 U. S., at 477. The third is pertinent here.

"In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.*, at 481.

*Cox Broadcasting* cited as an example of this type the case of *California* v. *Stewart*, decided with *Miranda* v. *Arizona*, 384 U. S. 436 (1966). The California Supreme Court had suppressed Stewart's confession on federal constitutional grounds and directed a retrial. See *id.*, at 498, and n. 71. If a retrial without the confession resulted in acquittal, the state would have no appeal, and hence the judgment was final for the purpose of this Court's review.

In the present case, a conviction on retrial would be followed by a sentence other than death. The state cannot appeal that sentence under Kansas law. The statute on criminal appeals provides for very limited appeals by the prosecution, none of which would apply to this situation. Kan. Stat. Ann. § 22-3602(b). Subdivision (b)(3) provides for appeals on a "question reserved," which in essence allows the prosecution to obtain an advisory opinion for future cases after "the case at hand has concluded . . . ." See *State* v. *Roderick*, 259 Kan. 107, 108, n. 1, 911 P. 2d 159, 161, n. 1 (1996). This procedure would not be available in this case because no unresolved question remains to be decided. The procedure is not available merely to have the state supreme court repeat what it has already said. See *State* v. *Holland*, 236 Kan. 840, 840, 696 P. 2d 401, 402 (1985). State law aside, review of the sentence in this Court may be precluded by the Double Jeopardy Clause as well. See *Bullington* v. *Missouri*, 451 U. S. 430 (1981).[2]

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2. In *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 111-112 (2003), a plurality indicated that *Bullington* should be limited to the death-eligibility determination, not the selection of sentence from the legally available range. However, the full Court has not yet gone that far, although *amicus* CJLF believes it should in an appropriate case. See *infra*, at 23.



The unavailability of review after remand distinguishes this case from *Johnson* v. *California*, 541 U. S. 428 (2004) (*per curiam*). In that case, the intermediate appellate court reversed a conviction on a *Batson*[3] claim without addressing other grounds. See *id.*, at 429. The state supreme court reversed on the *Batson* claim and remanded for decision of the other issues. See *ibid.* This situation "comes closest to fitting the third *Cox* category, but ultimately falls outside of it." *Id.*, at 430. Johnson could obtain review if his conviction were affirmed again on remand, *id.*, at 430-431, and ultimately he did. See *Johnson* v. *California*, 545 U. S. __, 125 S. Ct. 2410, 162 L. Ed. 2d 129 (2005). No such second-round review is available to the State in this case, so it qualifies for the third *Cox* category.

*B. Drawn in Question.*

The decision in the present case struck down the state's entire capital sentencing system on Eighth Amendment grounds. It would seem that the "drawn in question" element is easily met. However, in the Brief in Opposition, defendant Marsh puts great weight on the State's brief in the Kansas Supreme Court, in which the State did not challenge the precedent in *State* v. *Kleypas*, 272 Kan. 894, 40 P. 3d 139 (2001) that the "equipoise" provision was unconstitutional but severable. See Brief in Opposition 10; J. A. 40. Defendant relies on *Morrison* v. *Watson*, 154 U. S. 111, 115 (1894) for the proposition that when the state court applies an unchallenged precedent on the constitutionality of a statute, the requirement is not met. See Brief in Opposition 17-18.

*Morrison* is significantly different from the present case. In *Morrison*, the constitutionality of the statute was not questioned in the state court by the parties *or* by the court. Instead, "the construction and validity of the statute were treated as settled by the ruling in the earlier case . . . ." 154

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3. *Batson* v. *Kentucky*, 476 U. S. 79 (1986).

U. S., at 115. In the present case, the state court *could* have treated the invalidity of the equipoise provision as settled by *Kleypas*, but it did not. The federal constitutional holding was vigorously challenged by the three dissenting Justices in a 4-3 decision. See *Marsh*, 278 Kan., at 548-564, 102 P. 3d, at 466-474 (Davis, J.); *id.*, at 564-576, 102 P. 3d, at 475-482 (Nuss, J.); *id.*, at 583, 102 P. 3d, at 486 (McFarland, C.J.). The state recognized *Kleypas* as precedent, but chose not to challenge it. See *id.*, at 535, 102 P. 3d, at 458. The majority did not rely on procedural default, but rather reaffirmed *Kleypas* "[a]fter full reconsideration." *Id.*, at 537, 102 P. 3d, at 459.

As defendant correctly notes, Brief in Opposition 15, *Illinois* v. *Gates*, 462 U. S. 213, 218 (1983) described the original 1789 rule in conjunctive terms: "no jurisdiction unless a federal question had been both raised and decided in the state court below." The modern rule, however, is disjunctive: "the so-called 'not pressed *or* passed upon below' rule." *Id.*, at 219 (emphasis added).

*Cohen* v. *Cowles Media Co.*, 501 U. S. 663, 667 (1991) makes this point with unmistakable clarity. "It is irrelevant to this Court's jurisdiction whether a party raised below and argued a federal law issue that the state supreme court actually considered and determined." This principle also distinguishes *Howell* v. *Mississippi*, 543 U. S. __, 160 L. Ed. 2d 873, 125 S. Ct. 856 (2005) (*per curiam*). In that case, the defendant raised only state-law grounds, *and* the court decided only state-law grounds. See *id.*, 160 L. Ed. 2d, at 876-877, 125 S. Ct., at 857.

The validity of the Kansas statute under the Eighth Amendment was "drawn in question," and the Kansas Supreme Court decided the question. Exactly how that question came before the state court is, as *Cohen* said, "irrelevant to this Court's jurisdiction."



## II. The judgment in this case does not rest on independent state grounds.

In addition to the issues raised by the parties, the Court's order granting certiorari directed briefing on whether "the Kansas Supreme Court's judgment [was] adequately supported by a ground independent of federal law." There are several independent state ground arguments that conceivably could be made, including procedural default, the reversal of the underlying conviction, and severability. None of these is valid.

### *A. Procedural Default.*

A failure to raise an argument at the proper time or abandonment of an argument made at an earlier stage can be an independent state ground. See *Baldwin* v. *Reese*, 541 U. S. 27, 30-31 (2004) (failure to reassert in state supreme court claim raised and decided in lower court); *Sochor* v. *Florida*, 504 U. S. 527, 534 (1992) (claim rejected on appeal because not raised at trial). However, the state-law default does not block federal jurisdiction if the state court decides the case on the merits and not on the default. "[T]he state court must actually have relied on the procedural bar as an independent basis for its disposition of the case." *Caldwell* v. *Mississippi*, 472 U. S. 320, 327 (1985). "If the last state court to be presented with a particular federal claim reaches the merits, it removes any bar to federal-court review that might otherwise have been available." *Ylst* v. *Nunnemaker*, 501 U. S. 797, 801 (1991). As noted *supra*, at 8, the state court in the present case unambiguously redecided the equipoise question on the merits. Even if the decision were unclear, the doubt would be resolved in favor of jurisdiction, see *Caldwell*, *supra*, at 327, but the decision is perfectly clear. There is no alternative holding on procedural grounds as well as the merits. Cf. *Sochor supra*, at 533-534. The State's decision not to challenge *Kleypas* is merely noted at the top of the discussion and not mentioned again. See 278 Kan., at 535-537, 102 P. 3d, at 458-459. Under *Caldwell*, this

is not an independent state ground of the decision. It is not a ground of the decision at all.

*B. Reversal of Conviction.*

As noted *supra*, at 5, the state court reversed defendant's conviction of capital murder on grounds not questioned here. This is not an independent state ground supporting the judgment for much the same reasons it does not render the judgment nonfinal. The state court decision in this case did not merely reverse and remand for a new trial. It remanded for a new trial without the possibility of the death penalty upon reconviction. That aspect of the decision rests on federal law, and it is therefore reviewable in this Court, just as decisions suppressing evidence and remanding for trial without the evidence are reviewable. See *supra*, at 6.

*C. The Severability Question.*

Whether an invalid portion of a statute is severable from the remainder is a question of statutory interpretation. See *United States* v. *Booker*, 543 U. S. __, 125 L. Ed. 2d 738, 756, 160 S. Ct. 621, 651 (2005) (opinion of the Court by Breyer, J.). For a state statute, it is a matter of state law, see, *e.g.*, *Department of Treasury* v. *Fabe*, 508 U. S. 491, 509-510 (1993), and the decision of the state's highest court on that question is binding on all federal courts, including this Court. See, *e.g.*, *Johnson* v. *Fankell*, 520 U. S. 911, 916 (1997). However, a decision that the challenged portion really is invalid is a prerequisite to that state-law question, and where the challenge is based on the federal Constitution, that is a federal question. When a state court's decision on a question of state law is based on a federal law premise, this Court has jurisdiction to review the premise. See *Three Affiliated Tribes of Fort Berthold Reservation* v. *Wold Engineering, P.C.*, 467 U. S. 138, 152 (1984).

*Fox Film Corp.* v. *Muller*, 296 U. S. 207 (1935) provides an informative contrast in a severability case. Because the



opinion is somewhat cryptic, it is necessary to refer to the state court opinion and the briefs to understand it.

In *United States* v. *Paramount Famous Lasky Corp.*, 34 F. 2d 984 (DC SDNY 1929), the District Court found the arbitration section of a standard film distribution contract, drafted by the distributors and imposed on the theatres, to be a violation of the Sherman Act. This Court affirmed in *Paramount Famous Lasky Corp.* v. *United States*, 282 U. S. 30 (1930).

Fox Film Corporation, a distributor, brought suit for damages for breach of one of these standard contracts against Muller. See 296 U. S., at 208. "Mr. Muller [was] lessee of the theatre in Maple Lake [Minnesota] and the village furniture dealer, undertaker and plumber." Brief for Respondent in *Fox Film Corp.* v. *Muller*, No. 47, Oct. Term 1935, p. 24. The illegality of the arbitration clause under federal law, having been decided by this Court, was not questioned by the parties or decided by the state court. See *Fox Film Corp.* v. *Muller*, 192 Minn. 212, 213-214, 255 N. W. 845, 845 (1934); 296 U. S., at 210.

In the portion of the opinion designated "1," the state supreme court reviewed the numerous and conflicting decisions regarding whether the invalid arbitration clause was severable or whether it tainted the entire contract with illegality. The court decided it was not severable. See 192 Minn., at 214-218, 255 N. W., at 846-848. In a shorter section designated "2," the state court held that recovery was precluded by this Court's decision in a federal antitrust case, *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U. S. 227 (1909). See 192 Minn., at 218, 255 N. W., at 848.

In this Court, Fox Film contended that the Minnesota court's severability analysis was a misinterpretation of the District Court decision in *Paramount* (on a point not addressed in this Court's decision on appeal in *Paramount*) and erroneous under general severability law. Brief for Petitioner in *Fox Film*

*Corp.* v. *Muller*, No. 47, Oct. Term 1935, pp. 8-22. Fox Film further argued that federal antitrust law did not preclude recovery, challenging the state court's application of *Continental Wall Paper*. See *id.*, at 22-26.

This Court decided that it did not need to decide whether part 2 of the state court opinion decided a federal question. The severability holding was sufficient to sustain the judgment, and it was not federal. 296 U. S., at 209-210.

The critical distinction between *Fox Film* and the present case is that in *Fox Film* the illegality of the provision to be severed was no longer in issue. That question was "foreclosed" by the *Paramount* decision, *id.*, at 210, and not redecided by the state court. In the present case, that issue *was* redecided in full. See *supra*, at 8.

The decision of the Kansas Supreme Court that the "equipoise" provision is not severable, and that the entire statute must stand or fall with it, is a decision of state law. It is not reviewable in this Court. However, the decision that the entire statute falls rather than stands because the provision violates the Eighth Amendment is a decision of federal law which is within this Court's jurisdiction.

## III. Kansas' equipoise provision does not violate the Eighth Amendment.

The Kansas Supreme Court invalidated its state's death penalty statute because it requires the sentencer to impose the death penalty when the aggravating and mitigating circumstances are in equipoise. See *State* v. *Marsh*, 278 Kan. 520, 535-536, 102 P. 3d 445, 458-459 (2004); *State* v. *Kleypas*, 272 Kan. 894, 1015-1016, 40 P. 3d 139, 232 (2001); Kan. Stat. Ann. § 21-4624(e). While this Court has paid considerable attention to capital punishment in the years since *Furman* v. *Georgia*, 408 U. S. 238 (1972), the Eighth Amendment does not authorize judicial "micromanagement" of a state's capital



punishment system. See *Harris* v. *Alabama*, 513 U. S. 504, 512 (1995). There are limits to a court's Eighth Amendment authority over capital punishment, which the Kansas Supreme Court leapt over in this case. An understanding of these limits helps to illustrate why the Kansas Supreme Court's holding is incorrect, and demonstrates that a state can place limits on the defendant's efforts to obtain mercy without violating the Eighth Amendment.

### *A. Eighth Amendment Limits.*

Although this Court's capital punishment jurisprudence is often more complex than clear, the general limits to judicial regulation of capital punishment have been succinctly summarized:

> "In sum, our decisions since *Furman* have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant." *McCleskey* v. *Kemp*, 481 U. S. 279, 305-306 (1987).

Since the equipoise instruction has no bearing on the proportionality of Kansas' death penalty law or its eligibility requirements, the only relevant Eighth Amendment issue is whether this provision improperly prevents the jury from considering the relevant mitigating evidence. If the Kansas law does not conflict with this principle, then a court cannot invoke

the Eighth Amendment to invalidate the equipoise provision. If a state's death penalty system "narrows the class of death-eligible murderers and then at the penalty phase allows for the consideration of mitigating circumstances and the exercise of discretion," *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988), then it passes muster under the Eighth Amendment line of capital sentencing cases. "The Constitution requires no more." *Ibid.*

While the Eighth Amendment gives the capital defendant the right to present and have the jury consider mitigating evidence, this does not render the state powerless to regulate the jury's consideration of the evidence in the penalty phase of a capital case. In *Boyde* v. *California*, 494 U. S. 370 (1990), the defendant attacked a standard California jury instruction which told the jury that if the aggravating circumstances outweighed the mitigating circumstances then the jury "shall impose" death. *Id.*, at 374. He claimed that the " 'shall impose' language . . . precluded the jury from evaluating the 'absolute weight' of the aggravating circumstances and determining whether they justified the death penalty." *Id.*, at 376. Boyde also claimed that his language prevented the jury "from deciding whether, in light of all the aggravating and mitigating evidence, death was the appropriate penalty." *Ibid.* These arguments were rejected as inconsistent with the state's role in structuring capital punishment procedure. The jury does not have to be free to decline to impose death even if the aggravating circumstances outweigh the mitigating. See *id.*, at 377. The Eighth Amendment does not forbid the use of mandatory language like "shall" in death penalty instructions. Instead, this Court recognized that "there is no such constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.' " *Ibid.* (quoting *Franklin* v. *Lynaugh*, 487 U. S. 164, 181 (1988) (plurality opinion)).



*Boyde* applied *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), which endorsed legislative structuring of the capital jury's decision in similarly strong terms. Like *Boyde*, the *Blystone* decision upheld a state law mandating a death verdict from the jury in certain circumstances. The Pennsylvania law under attack in *Blystone* mandated a death verdict " 'if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstance or if the jury finds one or more aggravating circumstances which outweigh any mitigating circumstances.' " *Id.*, at 302 (quoting 42 Pa. Cons. Stat. § 9711(c)(1)(iv) (1988)). The rejection of that attack establishes a foundation for regulating the sentencing jury's decision in capital cases.

Blystone attacked the mandatory nature of the Pennsylvania law. A statute is unconstitutionally " 'mandatory' " when death is automatically imposed as in *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) or *Roberts* v. *Louisiana*, 428 U. S. 325 (1976). See 494 U. S., at 305. The statute in *Blystone* did not limit what types of mitigating evidence could be considered by the jury. See *ibid.* Under Pennsylvania law, death "is imposed only after a determination that the aggravating circumstances outweigh the mitigating circumstances present in the particular crime committed by the particular defendant, or that there are no such mitigating circumstances." *Ibid.*

If the jury is allowed to consider all of the relevant mitigating evidence, then the requirement for individualized sentencing is met. See *id.*, at 307-308. The mandatory instruction did not prevent the jury from considering any mitigating evidence offered by the defendant. See *ibid.* So long as a state's system is consistent with the two requirements explained in *McCleskey*, the State has the "traditional latitude to prescribe the method by which those who commit murder shall be punished." *Id.*, at 308-309.

Structuring the jury's decision is not inconsistent with the Eighth Amendment. Instead, the Eighth Amendment addresses real limits on the defendant's ability to present mitigating

evidence. A state law can be unconstitutional because a mandatory death sentence makes irrelevant any mitigating evidence regarding the particular defendant or circumstances of the crime. See *Sumner* v. *Shuman*, 483 U. S. 66, 78-79 (1987). The case that established the "all mitigation" rule involved an Ohio statute that recognized a relatively small set of mitigating circumstances, thus effectively excluding other mitigating evidence. See *Lockett* v. *Ohio*, 438 U. S. 586, 608 (1978) (plurality opinion). The decision that gave the *Lockett* plurality majority status involved a categorical limitation on the defendant's case for mitigation—a restriction that the sentencer could not consider the defendant's abusive family history. See *Eddings* v. *Oklahoma*, 455 U. S. 104, 112-113, and n. 8 (1982).

Structure can go too far under certain circumstances. The Kansas Supreme Court relied on *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) to support its holding that the equipoise provision was unconstitutional. See *State* v. *Kleypas*, 272 Kan. 894, 1012-1013, 40 P. 3d 139, 229-231 (2001). *Penry* struck down a Texas death sentence because the special issues that framed Texas' death penalty inquiry did not, in the circumstances of that case, allow the jury to give proper mitigating consideration to Penry's mental retardation and childhood abuse without extra instructions from the trial court. See 492 U. S., at 328. What *Penry* shows is that simply allowing mitigating evidence to be presented to the jury may not satisfy the Eighth Amendment if the jury cannot give proper mitigating effect to that evidence. However, that holding must be read in the context of the unusual mechanics of Texas' death penalty scheme.

Rather than having the jury simply evaluate the aggravating and mitigating evidence, the Texas capital jury must answer three questions before deciding the sentence:

> " '(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;



> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.' " *Jurek* v. *Texas*, 428 U. S. 262, 269 (1976) (lead opinion) (quoting Tex. Code Crim. Proc., Art. 37.071(b) (Supp. 1975-1976)).

The key issue in Texas has been when its special questions allow the jury to consider relevant mitigating evidence. *Jurek* held that this system was not invalid even though it did not explicitly mention mitigating circumstances, because the future dangerousness question allowed the jury to consider mitigating evidence such as the defendant's age, record, and mental or emotional state. See *id.*, at 272-273 (lead opinion). In most cases, it did. See *Johnson* v. *Texas*, 509 U. S. 350, 369-370 (1993); *Franklin* v. *Lynaugh*, 487 U. S. 164, 179-180 (1988) (plurality); *id.*, at 188 (O'Connor, J., concurring in the judgment).

The problem in *Penry* was a particular application of Texas' unique procedure. Because the first special issue whether the killing was deliberate did not further define that term, the jury might not have been able to use Penry's mental retardation in mitigation in spite of the potential mitigating effects of retardation with respect to whether he had the capacity to kill deliberately. See *Penry*, 492 U. S., at 322. Further, the mental retardation and childhood abuse evidence in Penry's case indicated a greater likelihood of future dangerousness, providing no vehicle for its morally mitigating weight under the second question. See *id.*, at 323-324. In order to satisfy the Eighth Amendment, the special inquiries had to be supplemented in order to allow the jury to give mitigating effect to Penry's retardation and childhood abuse. See *id.*, at 328. Texas has since amended its statute to add a fourth issue. See *Penry* v. *Johnson*, 532 U. S. 782, 803 (2001).

*Penry* demonstrates that Texas' former system had the potential to skip over the mitigating effects of some evidence. This decision does not stand for any general rule against structuring the jury's inquiry, as demonstrated by the subsequently decided *Boyde* and *Blystone*. Since Marsh's jury was given very broad instructions to consider mitigating evidence, see J. A. 24-26, *Penry*'s relevance to the present case is at best minimal.

While the sentencer must be allowed to give effect to the mitigating evidence, see *Franklin* v. *Lynaugh*, 487 U. S., at 185 (O'Connor, J., concurring in the judgment), the State can still structure the sentencer's discretion to impose life or death. If the defendant is allowed to present mitigating evidence and the instructions do not keep the jury from giving mitigating effect to the evidence or mislead the jury with regard to its role in sentencing, see *Romano* v. *Oklahoma*, 512 U. S. 1, 10 (1994), then the State is free to structure its capital sentencing procedure.

*B. Equipoise and the Eighth Amendment.*

The Kansas Supreme Court's holding that the equipoise provision violates the Eighth Amendment cannot be squared with a fair reading of this Court's precedents. The holding is summarized best in one passage:

> "Is the weighing equation in K.S.A. 21-4624(e) a unique standard to ensure that the penalty of death is justified? Does it provide a higher hurdle for the prosecution to clear than any other area of criminal law? Does it allow the jury to express its 'reasoned moral response' to the mitigating circumstances? We conclude it does not. Nor does it comport with the fundamental respect for humanity underlying the Eighth Amendment. Last, fundamental fairness requires that a 'tie goes to the defendant' when life or death is at issue. We see no way that the weighing equation in K.S.A. 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude K.S.A. 21-4624(e) as applied in this case is unconstitutional." *Kleypas*, 272 Kan., at 1015-1016, 40 P. 3d, at 232.



This passage is riddled with errors. No decision of this Court has required a "unique standard" for determining whether to impose the death penalty. So long as there is acceptable narrowing of death-eligibility and the sentencer is allowed to make an individualized assessment of the case for imposing the death penalty on the defendant, the state may fashion its capital punishment procedure as it sees fit. See *supra*, at 14. Outside the general parameters of the narrowing and individualized sentencing lines of precedent, states are free to structure their capital punishment systems. See *Payne* v. *Tennessee*, 501 U. S. 808, 824-825 (1991).

The Kansas Supreme Court made an even greater mistake by failing to examine the equipoise provision in its proper context. Jury instructions can neither be read nor analyzed in a vacuum. "Our decisions repeatedly have cautioned that instructions must be evaluated not in isolation, but in the context of the entire charge." *Jones* v. *United States*, 527 U. S. 373, 391 (1999); see also *Cupp* v. *Naughten*, 414 U. S. 141, 147 (1973). Although there is no Eighth Amendment problem with giving the "tie" to the prosecution, any residual difficulty with the Kansas law disappears when examined in the context of the state's entire capital sentencing scheme.

While Kansas law requires a death verdict if the aggravating and mitigating factors are equal, it also requires the prosecution to prove beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances. See Kan. Stat. Ann. §21-4624(e). J. A. 27. The *Kleypas* court quoted at length a Colorado Supreme Court opinion that distinguished *Boyde* and *Blystone* from Colorado's equipoise provision, because the laws in those cases allowed death to be imposed only if the aggravating circumstances outweighed the mitigating evidence. See 272 Kan., at 1005, 40

P. 3d, at 224-226 (quoting *People* v. *Young*, 814 P. 2d 834, 846 (Colo. 1991)).[4] While the Kansas law differs from the California law in this manner, viewed as a whole, it is more favorable for capital defendants than the system upheld in *Boyde*.

California law does not place this reasonable doubt standard on the prosecution. See *People* v. *Daniels*, 52 Cal. 3d 815, 886, 802 P. 2d 906, 945 (1991). Kansas' system disadvantages defendants relative to California's only when the case for aggravation and mitigation are absolutely equal in the eyes of the jury. Although it may be theoretically possible that a sentencing jury will view the cases for aggravation and mitigation to be exactly even, this event is highly unlikely in the real world. Juries are unlikely to make such a precise calculation of relative merit. Discretionary jury decisions are, in reality, largely beyond the control of instructions. See Higginbottom, Colloquy: Juries and the Death Penalty, 41 Case W. Res. L. Rev. 1047, 1051 (1991). The decision of the sentencing jury in a capital case is not the same type of decision as deciding between guilt and innocence. The capital sentencer's decision is more complex than that of the guilt phase jury's. The trial jury's decision has one central issue, whether the prosecution proves beyond a reasonable doubt that the defendant committed all of the elements of the crime, while " 'sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does.' " *Zant* v. *Stephens*, 462 U. S. 862, 902 (1983) (Rehnquist, J., concurring) (quoted with approval in *California* v. *Ramos*, 463 U. S. 992, 1008, n. 21 (1983)). The jury in the present case was instructed on three aggravating circumstances, seventeen

4. It is worth noting that the Colorado court, although discussing this Court's precedents, invoked the state and not federal Constitution, thereby precluding this Court's review of its conclusion. See *ibid.* Other states with "equipoise" statutes regularly reject attacks on them. See *DePasquale* v. *State*, 106 Nev. 843, 852, n. 10, 803 P. 2d 218, 223, n. 10 (1990); *Smith* v. *State*, 729 So. 2d 1191, 1225-1226 (Miss. 1998).



specified mitigating circumstances, and one catch-all mitigating circumstance. See J. A. 24-26. The chance that the jury would find all of this precisely evenly balanced is vanishingly small, particularly since it must make the decision beyond a reasonable doubt.

While the equipoise provision almost never harms the capital defendant, the reasonable doubt standard benefits Kansas capital defendants in every case. A defendant cannot be sentenced to death in Kansas unless the jury finds beyond a reasonable doubt that the aggravating circumstances are not outweighed by the mitigating circumstances. See Kan. Stat. Ann. § 21-4624(e). Reasonable doubt is only required by the Constitution for the facts necessary for a criminal conviction. In that context, it plays a primary role in reducing the risk of erroneous convictions and is a recognition of the criminal defendant's paramount interests of the accused in criminal cases. See *In re Winship*, 397 U. S. 358, 363 (1970). The reasonable doubt standard also " 'impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue.' " *Id.*, at 364. If a capital sentencing proceeding is not the same as a trial on guilt, the Constitution does not mandate the reasonable doubt standard for the sentencer's decision to impose life or death.[5] See, *e.g.*, *Oken* v. *State*, 378 Md. 179, 253-254, 835 A. 2d 1105, 1148 (2003), cert. denied, 541 U. S. 1017 (2004). By imposing this requirement, Kansas grants a real advantage to the capital defendant. If a criminal defendant without the benefit of the reasonable doubt standard at the guilt phase is at " 'a severe disadvantage,' " *id.*, at 363,

5. If a state makes an increase in an authorized punishment contingent on certain facts, other than a prior conviction, then those facts must be proven beyond a reasonable doubt to a jury. See *Ring* v. *Arizona*, 536 U. S. 584 (2002). The Kansas scheme does not present this problem since the eligibility factors must be proven beyond a reasonable doubt to a jury. See Kan. Stat. Ann. § 21-3439 (capital murder defined); *id.*, § 21-4624 (capital sentencing procedure). The present case only addresses what can be done to the weighing of factors that takes place after an eligibility finding.

then the Kansas capital defendant has a distinct advantage relative to his California counterpart at the sentencing proceeding.

While the reasonable doubt instruction makes the Kansas law more beneficial to the capital defendant than the system upheld in *Boyde*, the constitutionality of the Kansas law does not hinge on this factor. The Kansas provision does not prevent the defendant from presenting any mitigating evidence to the jury, nor does it tell the jury to give anything less than full effect to the mitigating evidence offered by the defense. It only structures the jury's decision in the extremely rare case where it determines that the aggravating and mitigating cases are equal. Before a Kansas defendant can get to this point, he must first be convicted of capital murder and the jury must find at least one aggravating circumstance.[6] In Kansas, capital murder is limited to an intentional or premeditated killing: (1) in the commission of a kidnapping for ransom, (2) "pursuant to a contract or agreement to kill," (3) by an inmate in jail or prison, (4) in the commission of or attempt of rape or criminal sodomy, (5) of a law enforcement officer, (6) of more than one person, or (7) of a child in the course of kidnapping to commit a sex offense. See Kan. Stat. Ann. § 21-3439. The aggravating factors also involve conduct or criminal record beyond the run-of-the-mine murder. See Kan. Stat. Ann. § 21-4625. Once the state has proven beyond reasonable doubt that the defendant has committed a crime making him eligible for the death penalty, the Eighth Amendment should not prohibit the state from requiring the defendant to prove that he deserves mercy.

In *Blystone*, this Court upheld a system that placed a burden of producing mitigating evidence on the defendant in some circumstances. While the system did not give the tie to the prosecution, it did mandate the death penalty if the prosecution

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6. Some states have two layers of "narrowing," even though the Constitution only requires one. See *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988). Kansas is one of them.



proved one aggravating circumstance and the jury found no mitigating circumstance. See 494 U. S., at 302. If the state proves one aggravating circumstance, then the burden effectively shifts to the defendant to prove a mitigating circumstance or suffer the death penalty. Although not analyzed as a burden shifting device, this procedure was upheld in *Blystone*. Since the statute in question, "does not limit the types of mitigating evidence which may be considered" and it did not automatically impose death "upon conviction for certain types of murder," the Pennsylvania law satisfied the individualized sentencing requirement. *Id.*, at 305. The Kansas law is no different in this respect and therefore should be treated similarly.

The *Kleypas* Court supported its decision with what it saw as the great similarity between a trial on guilt and the capital sentencing proceeding. See 272 Kan., at 1015, 40 P. 3d, at 232. While there is support for that proposition in the double jeopardy case of *Bullington* v. *Missouri*, 451 U. S. 430, 444 (1981), that similarity has no relevance to the present case. What matters here is not the relative " 'embarrassment, expense and ordeal' " of the penalty phase defendant to his guilt phase counterpart, see *id.*, at 445 (quoting *Green* v. *United States*, 355 U. S. 184, 187 (1957)), but the nature of the capital sentencer's decision. The decision between life and death is fundamentally different from the guilt versus innocence question. See *Ramos*, 463 U. S., at 1007.

While it makes sense to apply double jeopardy to the capital sentencer's decision when the decision involves the existence of an eligibility factor, *Sattazahn* v. *Pennsylvania*, 537 U. S. 101, 110-112 (2003) (plurality), it makes less sense with respect to the final sentencing decision made after the eligibility determination. In any event, the analogy to double jeopardy is too weak to support a new extension of the Eighth Amendment.

This Court implicitly upheld Arizona's equipoise provision in *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled on other

grounds, *Ring* v. *Arizona*, 536 U. S. 584. Petitioner addresses this point in detail, as have the dissenters in the Kansas Supreme Court. See Brief for Petitioner Part II-A; *State* v. *Marsh*, 278 Kan. 520, 559-560, 102 P. 3d 445, 470-472 (2004) (Davis, J., dissenting); *id.*, at 564-573, 102 P. 3d, at 475-480 (Nuss, J., dissenting). While the *Walton* majority is less than clear whether it is addressing the burden of proof on the ultimate weighing as distinct from the individual circumstances, see 497 U. S., at 649-651, the point was unambiguously raised by the dissent as a reason for the unconstitutionality of the Arizona capital punishment system that was under review in *Walton*. See *id.*, at 687 (Blackmun, J., dissenting) (making exactly the argument accepted by the state court in this case). Refusal to address an argument raised by the dissent or the party implicitly rejects that claim. See *Clemons* v. *Mississippi*, 494 U. S. 738, 747-748, n. 3 (1990). Whether the *Walton* majority opinion is interpreted to address the dissent's argument or not, it is still a rejection of that argument and a holding contrary to the state court decision in the present case.

By convicting him of capital murder, the state has already made its case that the defendant should be executed. At the sentencing hearing the capital defendant is not attempting to litigate a disputed point like a defendant accused of driving under the influence or a former patient seeking compensation for a doctor's alleged malpractice. The capital defendant is attempting to mitigate his culpability for committing the very worst type of crime. While the state must prove guilt beyond a reasonable doubt, it can place on the accused the burden of proving incompetence to stand trial, see *Medina* v. *California*, 505 U. S. 437, 450-451 (1992), or an affirmative defense to the crime. See *Martin* v. *Ohio*, 480 U. S. 228, 236 (1987); *Patterson* v. *New York*, 432 U. S. 197, 211 (1977). The Eighth Amendment, which does not even impose a reasonable doubt requirement on the decision to impose death, does not prevent the state from requiring the death-eligible defendant to prove his case for mitigation. The defendant went before the sentencing jury convicted of crimes such that he was constitutionally



eligible for the death penalty. Requiring one so culpable to prove that he should be spared does not offend the Eighth Amendment.

To restore capital punishment in Kansas, this Court need do little more than repeat what it said in *Harris* v. *Alabama*, 513 U. S. 504 (1995). "We have rejected the notion that 'a specific method for balancing mitigating and aggravating factors is constitutionally required.' " *Id.*, at 512 (quoting *Franklin*, 487 U. S., at 179). The question of whether to impose a death sentence or life sentence in the infinitesimal portion of the spectrum where aggravating factors equal mitigating factors is a question of state law. The decision of that question was well within the legitimate power of the state legislature.

## IV. Constant churning of the rules causes arbitrariness in execution.

### *A. Consistency in Sentencing.*

In *Furman* v. *Georgia*, 408 U. S. 238, 309-310 (1972) (concurring opinion), Justice Stewart noted that "the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Underlying *Furman* was a concern that the penalty was discriminatorily imposed on black defendants. See *Graham* v. *Collins*, 506 U. S. 461, 479-484 (1993) (Thomas, J., concurring). The dramatic post-*Furman* reduction of arbitrariness and bias in which defendants are *sentenced* to death is one of the great success stories of American law, and one that has gone nearly unnoticed. See Scheidegger, Smoke and Mirrors on Race and the Death Penalty, 4 Engage 42, 44 (2003), http://www.fed-soc.org/Publications/Engage/oct%2003.pdf. However, arbitrariness in which of these murderers are actually *executed* remains a scandal, and constant changing of the rules is a major contributing factor.

The best known study on race and sentencing is the Baldus study litigated in *McCleskey* v. *Kemp*, 481 U. S. 279 (1987). This study was sponsored in substantial part by the NAACP Legal Defense and Educational Fund, see D. Baldus, G. Woodworth, & C. Pulaski, Equal Justice and the Death Penalty 44 (1990) (cited below as "Baldus"), an organization vehemently opposed to capital punishment. See *Graham*, 506 U. S., at 481 (Thomas, J., concurring). Baldus himself, by the time of McCleskey's habeas hearing at least, had developed "something of a partisan bias." *McCleskey* v. *Zant*, 580 F. Supp. 338, 368 (ND Ga. 1984), aff'd in part, 753 F. 3d 877 (CA11 1985), aff'd in *McCleskey* v. *Kemp*, *supra*. To the extent this study supports the current system, an extent much greater than commonly appreciated, it is a kind of declaration against interest, carrying extra weight.

The study confirmed that the post-*Furman* reforms had made sentencing less arbitrary. See Baldus, *supra*, at 97. The pre-*Furman* system had indeed substantially discriminated against black defendants. *Id.*, at 147. The post-*Furman* data were very different. "What is most striking about these results is the *total absence* of any race-of-defendant effect." *Id.*, at 150 (emphasis added). This is a result worth celebrating. For any American institution to reduce the effect of race to the degree that a social scientist cannot find it, though he very much wants to, is a great achievement. The subsequent litigation concerned Baldus' claim to have found a race-of-the-victim effect. The District Court found the model that produced that claim to be "totally invalid for it contains no variable for strength of the evidence . . . ." 580 F. Supp., at 367. Models which do account for that entirely legitimate factor "*produce* no *statistically significant evidence that race plays a part in either* [the charging or sentencing] *decisions in the State of Georgia*." *Id.*, at 368 (emphasis in original).

A study of California cases by RAND Corporation, commissioned by the Attorney General, similarly found no evidence of discrimination. See Klein & Rolph, Relationship



of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33 (1991). A special master appointed by the New Jersey Supreme Court, a tribunal quite hostile to the death penalty, found the same. D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001), http://www.judiciary.state.nj.us/baime/baimereport.pdf. The much-ballyhooed "disparity" between the demographics of federal death row and the general population turns out to reflect the demographics of drug gangs, and not racial bias. U. S. Dept. of Justice, The Federal Death Penalty System: Supplementary Data, Analysis and Revised Protocols for Capital Case Review 1 (2001).

Yet another study was commissioned by the Legislature of Nebraska and headed again by Baldus. This study again found no bias on race of either the defendant or the victim. D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999): A Legal and Empirical Analysis, Executive Summary 14-22 (2001).

A recent, major study in Maryland, again conducted by an opponent of capital punishment, "*found no evidence that the race of the defendant matters in the processing of capital cases in the state*." R. Paternoster, *et al.*, An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction, Executive Summary 26 (2003) (emphasis in original), http://www.urhome.umd.edu/newsdesk/pdf/exec.pdf. An apparent "race of victim" effect in statewide data disappeared into the statistical grass when analyzed separately by county. *Id.*, at 32. There are fewer death sentences in black-victim cases simply because more black victims live in urban counties, where the people elect prosecutors who seek the death penalty less often and where they form juries who impose it less often. This so-called "geographic disparity" is, in fact, local democracy and jury of the vicinage, operating as designed. See Scheidegger, 4 Engage, at 45. In short, the dramatic reduction of the arbitrari-

ness and bias of the pre-*Furman* era regarding those sentenced to death is a mission accomplished.

*B. Arbitrariness in Execution.*

Regrettably, the same cannot be said for the actual execution of those sentences. At the end of the year 2003, there were 3,374 murderers on death row, but only 65 sentences were carried out that year. See U. S. Dept. of Justice, Bureau of Justice Statistics, Capital Punishment 2003, p. 1 (2004). In the same year, 96 persons were removed from death row because their sentences had been overturned judicially. *Id.*, at 9.[7] Protracted delays and large percentages of reversals result in very few of the sentences actually being carried out.

Regrettably, there is no good, comprehensive research on the reasons for high reversal rates.[8] Those of us who have worked long in the field know qualitatively, if not quantitatively, that changes in the rules are a major part of the problem.

To illustrate, let us consider three hypothetical murderers of equal culpability, A, B, and C, tried and sentenced to death in the State of Maryland. In that state, a standard jury instruction on mitigating circumstance was crafted by the state's advisory committee on rules and promulgated as a rule by the state's highest court. However, in *Mills* v. *Maryland*, 486 U. S. 367 (1988), this Court declared the standard instruction invalid, based on the possibility it might be misconstrued by a jury giving it a strained interpretation. See *id.*, at 393 (Rehnquist, C. J., dissenting). *Mills* created a new rule of law, not required by this Court's precedents up to that time, and that rule was not

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7. Total removals from death row were an anomalously high 257 in this year because of the controversial mass commutation by the Governor of Illinois. See *id.*, at 8-9.

8. There is some bad research. See "Error Rate" Study is Riddled with Errors of Its Own, in California District Attorneys Association, Prosecutors' Perspective on California's Death Penalty 40-44 (2003), http://www.cdaa.org/WhitePapers/DPPaper.pdf.



essential to the fundamental fairness of the proceeding. See *Beard* v. *Banks*, 542 U. S. 406 (2004).

Our first hypothetical murderer, A, goes all the way through the system before *Mills* is decided, and A is executed. B's case is tried before *Mills* but decided on appeal afterward, and the sentence is reversed. An overloaded prosecutor's office presented with a stale, years-old case decides not to seek the death penalty again, and B escapes his just punishment. C is tried after *Mills* and the judge uses a different verdict form. His case is affirmed, and he is executed.

These different results come not from different culpability but merely from the fortuity of timing relative to the disapproval of a previously accepted practice and creation of a new rule. If the practice in question really is fundamentally unfair, then such disparate treatment may be a price worth paying. *Furman* itself, despite the massive disruption it caused, was worth the price. As time goes on, though, fewer and fewer new rules are even arguably so fundamentally unfair. See *Tyler* v. *Cain*, 533 U. S. 656, 667, n. 7 (2001).

In *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases, this Court established the broad outlines of what is required to fix the *Furman* problem: narrowing of the eligible class and consideration of mitigating circumstances. In *Lowenfield* v. *Phelps*, 484 U. S. 231, 246 (1988), this Court said, "The Constitution requires no more." Yet the Court has required more, going over standard jury instructions with a nit comb in cases such as *Mills* and *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), producing arbitrary reversals in bulk by disapproving statutes and standard instructions which complied with all of this Court's requirements as of the time they were drafted.

In the fight against arbitrariness in capital punishment, the Court might well quote Walt Kelly's Pogo, "We have met the enemy, and he is us." J. Bartlett, Familiar Quotations 455, n. 1 (15th ed. 1980). Constant tinkering with the rules causes more arbitrariness than it cures. It is high time to put a stop to it. If

the state's sentencing system complies with the broad outlines of *Gregg*, and if the punishment is valid for the crime and the defendant, the Eighth Amendment inquiry should end. The details of sentencing procedure and jury instructions should be considered matters of state law, within the control of the people's elected representatives. Indeed, the creation out of whole cloth of restrictions that are not really in the Constitution is itself a violation of a constitutional right. The people of each state have the constitutional right to exercise all governmental powers neither forbidden by the Constitution nor yielded to the federal government. See U. S. Const., Amdt. 10.

The statute enacted by the representatives of the people of Kansas was not contrary to any of this Court's precedents when it was enacted, and there is nothing fundamentally unfair about it. By creating a new federal constitutional rule out of blue sky, the Kansas Supreme Court arbitrarily removed a group of murderers from death row without any regard for whether their sentences are deserved. This is more arbitrary and more unjust than any of the practices disapproved in *Mills*, *Penry*, or *Kelly* v. *South Carolina*, 534 U. S. 246 (2002), to name just a few. This decision must not stand.

## CONCLUSION

The decision of the Kansas Supreme Court should be reversed.

August, 2005

Respectfully submitted,

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# AMICUS CURIAE BRIEF

GRANTED No. 04-1170

Supreme Court, U.S.
FILED
OCT 17 2005
OFFICE OF THE CLERK

In The
# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

v.

MICHAEL L. MARSH II,

*Respondent.*

**On Writ Of Certiorari To The Supreme Court Of The State Of Kansas**

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## INTERESTS OF *AMICUS CURIAE*[1]

*Amici* are professors who teach at the two law schools located in the State of Kansas who support the Kansas Supreme Court's conclusion that the unique Kansas death penalty sentencing scheme, by forcing uncertain jurors to impose the death penalty, violates the United States Constitution.

*Amici* believe that the Kansas Supreme Court appropriately discharged its obligation as the final arbiter of Kansas law and a primary enforcer of the federal Constitution within the State of Kansas. The criticism of the Court by the State's lawyers in the Brief for Petitioner, and by the lawyers for *amici* state of Arizona, et al., and the Criminal Justice Legal Foundation, fails, in our view, to accept the unique role given to each state court to interpret its own statutes. We believe that the Kansas Supreme Court has the power to conclude that its own statute operates differently from the statutes of the *amici* states; it functions in a manner which deprives defendants of individualized consideration in capital sentencing trials by failing to "allow the jury to express its 'reasoned moral response' to the mitigating circumstances." *State v. Kleypas*, 40 P.3d 139, 231 (Kan. 2001).

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[1] This brief was written entirely by *amicus* and their counsel, with substantial assistance from the following students from Washburn University School of Law: Chad Barnhart, Andrew Hartnett, Joni Johnson, Daniel Keenan, Luanne Leeds, Roy Mozingo, Sabrina Sullivan, Angela Weatherford, and Jenny Williams. No contributions were made to the preparation or submission of this brief by any party or from any outside source. The views expressed in this brief are those of the individual professors, whose signing does not reflect the official views of the institution. Both parties have consented in writing to the filing of this brief.



## SUMMARY OF FACTS AND CASE

In *State v. Kleypas*, the Kansas Supreme Court issued an exhaustive opinion examining the constitutionality of its recently enacted death penalty statute, under which the defendant is sentenced to death or to life imprisonment without parole for twenty-five years or forty years based solely on the following formula:

> If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K.S.A. 21-4625 and amendments thereto exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise, the defendant shall be sentenced as provided by law.

K.S.A. § 21-4624(e).[2] Although the statute requires the Kansas Supreme Court to set aside a death sentence if it finds that "the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor," K.S.A. § 21-4627(c)(1), neither the trial court nor the Kansas Supreme Court has the power to independently re-weigh aggravating and mitigating factors or to review the sentence for proportionality. *See State v. Kleypas*, 40 P.3d at 239-41. The statute is identical in material respects to the capital punishment statute which Kansas' neighboring state of Colorado had found unconstitutional

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[2] The Kansas Legislature "rejected [the] suggestion of the attorney general [that the statute is unconstitutional] and adopted our present statute," in spite of the fact that no other jurisdiction in the United States deprives hesitant jurors of any and all power to impose a life sentence in a capital case. A-51.

In its brief in response to Marsh's argument, the state "concede[d] that under *State v. Kleypas* defendant's death sentence must be vacated and his case remanded for resentencing under K.S.A. § 21-4624(e) as construed by this Court. . . . [b]ecause defendant's death sentence was imposed as a result of the same *unconstitutional* application of K.S.A. § 21-4624(e) as occurred in *Kleypas*." A-40 (emphasis added). Similarly, the state conceded that the verdict forms submitted to the jury were erroneous and required reversal of Marsh's death sentence. A-44.[6]

In its opinion issued December 17, 2004, the Kansas Supreme Court adhered to its earlier, unchallenged opinion in *Kleypas* finding the statute unconstitutional. However, the court agreed with Marsh's counsel, and with Judge Davis' dissenting opinion in *Kleypas*, that the court had "erred in substituting a weighing equation with exactly the opposite effect of the equation provided by the legislature." *State v. Marsh*, 102 P.3d 445, 461 (Kan. 2004). The court vacated the portion of *Kleypas* which created a new tie-goes-to-life sentencing formula, stating:

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[6] The verdict forms gave the jury only two alternative choices:

(a) Finding beyond a reasonable doubt that there are one or more aggravating circumstances and that they are not outweighed by any mitigating circumstances, and sentencing the defendant to death; or

(b) Reasonable doubt that aggravating circumstances are not outweighed by any mitigating circumstances and sentencing the defendant to life imprisonment with parole eligibility set by the court at either twenty-five years or forty years.

A-27. No instruction required the jury to determine whether death was the appropriate punishment.

punishment. *State v. Kleypas*, 40 P.3d at 231. Since the Kansas Supreme Court is the final authority on questions of Kansas law, this Court and the parties must accept that court's interpretation of its own statute. Similarly, when the Kansas Supreme Court compares its own statute to the statutes of other states, and concludes that its own statute operates differently, that holding is also entitled to great deference, as the Kansas Supreme Court is "the ultimate expositor[ ] of [its own] state law," and "[this Court is] bound by their constructions except in extreme circumstances not present here." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975) (citations omitted); *see also, e.g.*, *Reitman v. Mulkey*, 387 U.S. 369 (1967). Thus, the conclusion of the Kansas Supreme Court that its statute deprives capital defendants of reliable, individualized consideration, and precludes doubtful jurors from effectual consideration of mitigating evidence in a close case is a fixed starting point for any constitutional analysis of the issue.

This Court's Eighth Amendment jurisprudence has made it abundantly clear that a constitutional death penalty scheme must give individualized consideration to each defendant, and further that a capital sentencing scheme cannot preclude a juror from giving effect to mitigating circumstances and evidence. *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). The Kansas Supreme Court correctly found that K.S.A. § 21-4624(e) violates the Eighth Amendment because its sentencing formula, which operates like none other in the United States, requires jurors to impose a sentence of death if the weighing of mitigating and aggravating circumstances yields inconclusive results.

death penalty." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

**1. There is no sound basis for rejecting the Kansas Supreme Court's interpretation of its own law.**

The starting point for any constitutional analysis is the mechanical operation of the Kansas capital sentencing statute. On that question, there is no room to quibble with the decision of the Kansas Supreme Court that the statute operates to compel doubtful jurors to impose a sentence of death. This Court "repeatedly has held that *state courts are the ultimate expositors of state law*, . . . and that we are bound by their constructions except in extreme circumstances." *Mullaney v. Wilbur*, 421 U.S. at 691 (emphasis added), *citing Murdock v. City of Memphis*, 20 Wall. 590 (1875); *Winters v. New York*, 333 U.S. 507 (1948). A state court's ruling "should [be] bind[ing] unless so unfair and unreasonable in its application to those *asserting* a federal right as to obstruct it." *Central Union Telephone Co. v. Edwardsville*, 269 U.S. 190, 195 (1925) (emphasis added). Therefore, this Court "accept[s] as binding the [Kansas Supreme] Court's construction of state homicide law." *Mullaney v. Wilbur*, 421 U.S. at 691. The holding of the Kansas Supreme Court as to the operation of its statute, including its determination that K.S.A. § 21-4624(e) precludes a jury in "doubtful cases" from giving meaningful consideration to the individual circumstances of the accused, *State v. Kleypas*, 40 P.3d at 231-32, is therefore entitled to substantial deference. "It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law." *Stringer v. Black*, 503 U.S. 222, 235 (1992).

> rejected Kleypas' argument. The State's argument is premised on its view that the Arizona statute "is functionally indistinguishable from the Kansas statute in this respect." We disagree and find the two statutes distinguishable. The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before this court. Such a weighing equation results in mandating a death sentence where the jury finds equipoise as to the mitigating and aggravating circumstances.

*State v. Kleypas*, 40 P.3d at 226. The Kansas Supreme Court engaged in a detailed explanation of the sentencing mechanics of each statute, and demonstrated how each is functionally very different from the other. 40 P.3d at 228.[6]

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[6] The State court noted that the statute at issue in *Walton v. Arizona* was identical to Montana's, in that it requires a sentencer who finds one or more aggravating factors to impose the death penalty if "there are no mitigating circumstances sufficiently substantial to call for leniency." *State v. Kleypas*, 40 P.3d at 227, *quoting* Mont. Code Ann. § 46-18-305 (1977). The Montana Supreme Court found that its statute "does not require the death sentence to be imposed if the aggravating and mitigating factors are of equal weight." *Id.*, *quoting Montana v. Smith*, 863 P.2d at 1012. The Kansas Supreme Court observed:

> If a sentencer in Arizona thought aggravating and mitigating circumstances were equally balanced, he or she could reasonably conclude that there were mitigating circumstances 'sufficiently substantial to call for leniency,' *or* he or she could reach the opposite conclusion. The law leaves the sentencer free to decide either way. In contrast, a Kansas juror who reached the same conclusion about the relative balance between aggravation and mitigation would have only one option: to impose death. In fact, under the Arizona scheme a sentencer who thought that aggravating

(Continued on following page)

sister states, that Kansas law materially differs from all other, constitutional sentencing schemes. In a similar dispute over the interpretation of an Idaho statute with a similar federal counterpart, this Court observed, "Even if the . . . statutes contained identical language – and they do not – the interpretation of the Idaho statute by the Idaho Supreme Court would be binding on federal courts." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the state. As discussed in more detail below, the judgment of the Kansas Supreme Court rests on a finding that the Kansas capital sentencing statute mandates that an undecided jury return a verdict of death, resulting in an inherently unreliable sentencing scheme that deprives a defendant of individualized consideration in the assessment of punishment. Petitioner and its *amici* present this Court with "no persuasive considerations indicating that these judgments should be overturned." *Reitman v. Mulkey*, 387 U.S. at 381. To the contrary, the decision of the Kansas Supreme Court reflects a faithful commitment to its "constitutional obligation to safeguard personal liberties and to uphold federal law." *Stone v. Powell*, 428 U.S. 465, 494 n.35 (1976).

mitigating circumstances]." *Id.* at 226, *quoting Hulsey v. Sargent*, 868 F. Supp. 1090, 1101 (E.D. Ark. 1993). The Kansas Supreme Court found that requiring a juror in such a state of indecision to impose a sentence of death violates the constitutional mandate for "reliability in the determination that death is the appropriate punishment in a specific case." 40 P.3d at 231, *quoting Woodson*, 428 U.S. at 305. Therefore, a sentence of death rendered in accordance with the statute is not a definitive determination by a jury that the defendant deserves the death penalty, only that there may or may not be doubt as to that question. That fact sets the Kansas scheme apart from every other capital sentencing scheme in the nation.

Petitioner and its *amici* also misconstrue the scope of the ruling of the Kansas Supreme Court by failing to read *Kleypas* and *Marsh* together. It is true that in *Kleypas* the Kansas Supreme Court, consistent with the recommendation of the Kansas Attorney General, adopted a sentencing formula requiring the jury to impose a sentence of death only if it finds that "aggravating circumstance or circumstances outweigh any mitigating circumstance found to exist." *State v. Kleypas*, 40 P.3d at 234.[12] However, that portion of its opinion was vacated in *Marsh*, which held that the State's highest court "lacks legislative power to

[12] It is important to note that the sentencing formula legislated by the Court in *Kleypas* is identical to the one found constitutional by this Court in *Blystone v. Pennsylvania*, 494 U.S. 299, and *Boyde v. California*, 494 U.S. 370, in which the death penalty is required if aggravating circumstances outweigh mitigating circumstances. Thus, the argument of Petitioner and *amici* supporting petitioner that the Kansas Supreme Court's decision conflicts with *Blystone* and *Boyde* is clearly wrong. To the contrary, the *Kleypas* decision is in perfect harmony with them.

the *Kleypas* and *Marsh* cases used the very same language at issue to persuade the jury to impose the death penalty. In Mr. Marsh's penalty trial, the prosecutor told the jury in closing argument that "only if those mitigating circumstances outweigh the aggravating circumstances that you know are there, only then may [they] be considered because . . . the Judge has told you that the law says that if the aggravating circumstances are not outweighed by mitigating circumstances, you shall return a verdict of death." Record, Vol. 54 at 54-55. In the *Kleypas* case, the prosecutor emphasized to the jury that it *must* impose death even if the mitigating circumstances were as persuasive as the aggravating circumstances. A-61. Thus, the concerns of the Kansas Supreme Court were not remote possibilities, but would likely come into play in any case in which there is substantial mitigation.

The Kansas Supreme Court was right to be concerned that the language of K.S.A. § 21-4624(e) is an open invitation to the jury to abdicate its responsibility – to make a decision by avoiding a decision, and that defendants would thereby be "deprived of the precision that individualized consideration demands" under the Eighth Amendment. *Stringer v. Black*, 503 U.S. at 231.[14] Indeed, the statutory

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[14] Studies conducted by the Capital Jury Project have confirmed that jurors faced with the responsibility for deciding a capital case often seek "ways to deny their personal moral responsibility for the sentencing decision." Joseph L. Hoffman, *The Capital Jury Project: Where's the Buck? – Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 Ind. L.J. 1137, 1157 (1995). Structured post-trial interviews with capital sentencing jurors show that they are "predisposed to use almost any available information to downplay their responsibility for the sentencing decision-including information that accurately describes the sentencing process." *Id.* at 1138.

weighing formula gives the prosecution powerful ammunition for neutralizing persuasive mitigation. The prosecutor in *Kleypas* explained the instructions to the jury as follows:

> If the aggravators are not outweighed by the mitigators, you shall impose the death penalty. *Not that you may, not that you can*, but that you *shall* impose the death penalty and this is the duty that you have sworn to uphold, shows command, *it means must*.

*State v. Kleypas*, Record on Appeal, Vol. 71, p. 26 (emphasis added). Referring repeatedly to the statutory formula, the prosecutor rhetorically asked the jury, "Does [Gary Kleypas' schizophrenia] lessen what he did, could that possibly outweigh what he did to Carrie Williams[?]" *Id.* at 52. The prosecutor concluded his discussion of aggravating and mitigating circumstances by telling the jury that the mitigating circumstances "do not outweigh the aggravators combined," *id.* at 62, and told them to "envision that scale that we talked about on voir dire. If you put the aggravators on one side, and the mitigators on the other side, those mitigators have to outweigh the aggravators. And in this case, when they do not, you are told what your duty is, you shall impose the death penalty." *Id.* at 63. The prosecutor concluded by acknowledging that the jury faced a hard choice, but reminded them of the mandatory nature of the death penalty, and used a posterboard of the weighing formula to drive home his point that a tough choice inevitably means death. *Id.* at 67.

The Kansas Supreme Court therefore decided this issue in a case that involved substantial mitigating factors as well as substantial aggravating factors, where the jury could reasonably interpret the instructions to mean that

the mere difficulty of choosing between aggravating and mitigating factors mandates a sentence of death. Any jury conscientiously following these instructions would agree that their inability to make a decision requires them to join in a verdict of death, even if they would rather express their findings of mitigation with a life sentence. This is contrary to the core philosophy of this Court's Eighth Amendment jurisprudence:

> A fair statement of the consensus expressed by the Court in *Furman* is that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."

*Zant v. Stephens*, 462 U.S. at 874, *quoting Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.). In finding that the sentencing equation of K.S.A. § 21-4624(e) violates the Eighth Amendment, the Kansas Supreme Court was fulfilling its duty "[in] capital cases [to] see to it that the jury has rendered its decision with meticulous care." *Godfrey v. Georgia*, 446 U.S. at 443 (Burger, C. J., dissenting). Petitioner fails to present any "persuasive considerations indicating that [this] judgment[] should be overturned." *Reitman v. Mulkey*, 387 U.S. at 381.

A statute which forces undecided jurors to impose a sentence of death in spite of substantial mitigating evidence fails to accord individual defendants the fundamental respect for human dignity that is embodied in the Eighth Amendment, and "treats all persons convicted of [murder] not as uniquely individual human beings, but as

members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." *Woodson v. North Carolina*, 428 U.S. at 304. The Kansas Supreme Court properly held that such a statute is simply inconsistent with this Court's repeated admonition, in many contexts, of "the 'acute need' for reliable decision-making when the death penalty is at issue." *Deck v. Missouri*, ___ U.S. ___, 125 S. Ct. 2007, 2014 (2005). The decision of the Kansas Supreme Court that K.S.A. § 21-4624(e) violates the Eighth Amendment finds ample support in this Court's jurisprudence.

## CONCLUSION

The decision of the Kansas Supreme Court should be affirmed.

Respectfully submitted,

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No. 04-1170

Supreme Court, U.S.
OCT 19 2005

In The

# Supreme Court of the United States

STATE OF KANSAS,

*Petitioner,*

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MICHAEL LEE MARSH II,

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**On Writ Of Certiorari To The Supreme Court Of The State Of Kansas**

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## QUESTIONS PRESENTED

1. Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?

2. Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. § 1257 where the petitioner failed to present to the Kansas Supreme Court below – and where it explicitly withdrew from contention in that court – the federal constitutional issue that is the sole ground on which it seeks this Court's review?

3. Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?

4. When a state capital sentencing statute makes the choice of a death or life sentence depend upon weighing aggravating circumstances against mitigating circumstances, does it violate the Eighth and Fourteenth Amendments for the statute to mandate a death sentence when the jurors are in equipoise and cannot reach an individualized determination whether aggravation or mitigation predominates?

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## STATEMENT OF THE CASE

### I.

On June 17, 1996, Marry Ane Pusch was shot and stabbed to death in her home. Her body was doused with charcoal lighter fluid and set on fire. Her 19-month-old daughter, M.P., suffered severe burns in the ensuing fire. M.P. survived the fire but later died in the hospital. Pet. App. at 7a-8a.

Michael Marsh was charged with the capital murder of M.P. The charging papers alleged that he killed M.P. "intentionally and with premeditation" and that "the intentional and premeditated killing of [M.P.], and Marry Ane Pusch, . . . was part of the same act or transaction or two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct." Record on Appeal, Supreme Court of Kansas, No. 98-81135-S, Vol. 11 at 1085.[1] Mr. Marsh was charged separately with the non-capital first degree premeditated murder of Marry Ane, aggravated arson, and aggravated burglary. Record, Vol. 11 at 1084-1085.

The State filed a pretrial motion *in limine* to prohibit Mr. Marsh from introducing any circumstantial evidence that Eric Pusch, Marry Ane's husband and M.P.'s father, was involved in the crimes. The motion contended that a state-law rule relating to the admissibility of proof of third-party culpability required exclusion of Mr. Marsh's evidence because of his confession that he had shot Marry Ane Pusch. Record, Vol. 10 at 937, 969-971.

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[1] Citations to the Record on Appeal will hereafter appear as "Record, Vol. ___ at ___."

In response to the motion *in limine*, Mr. Marsh proffered substantial evidence connecting Eric Pusch to the crimes and establishing that Pusch had a motive and opportunity to commit them. Record, Vol. 92 at 1-362. The proffered evidence was consistent with Mr. Marsh's confession, in which he admitted shooting Marry Ane but denied stabbing her and denied setting the fire. Record, Vol. 81 at 42, 46, 51, 75, 77; Record, Vol. 82 at 52; Record, Vol. 90 at 10, 14, 19, 27, 29. Mr. Marsh's statements were corroborated by the State's own forensic evidence, which showed that, while both Marry Ane's and M.P.'s clothing tested positive for medium petroleum vapors consistent with lighter fluid, no trace of the substance was found on the clothing and shoes Mr. Marsh wore on the night in question. In addition, DNA analysis revealed that, though Marry Ane's blood was found on one of Mr. Marsh's shoes, so also was the blood of Eric Pusch. Pet. App. at 8a-9a.

When questioned about the blood, Pusch had no explanation for it. Pusch, who claimed he was at his job as a Pizza Hut delivery man at the pertinent times, also had no explanation for a 29-minute gap in his pizza deliveries, which would have allowed him to return home within the time period when his wife was killed and the house was set on fire. Record, Vol. 92 at 138-142, 149-163.

The trial court adopted the State's interpretation of the rule excluding evidence of third-party culpability and refused to allow Mr. Marsh to present such evidence. Record, Vol. 65 at 33-38. Even when Eric Pusch was called by the State to testify against Mr. Marsh, the trial court rejected Marsh's argument that the State had thereby opened the door to his proffered evidence. Record, Vol. 43 at 100-101, 118-121; Record, Vol. 45 at 12-17. Mr. Marsh

was convicted as charged and sentenced to death. Pet. App. at 9a-10a.

On direct appeal, the Kansas Supreme Court reversed Mr. Marsh's convictions of capital murder and aggravated arson and ordered a new trial. It held that the trial court had denied Mr. Marsh a fair trial by excluding his evidence that Eric Pusch was involved in the crimes. Pet. App. at 11a-17a.

The Kansas Supreme Court gave several reasons for holding that the trial court had erred in excluding the evidence implicating Eric Pusch. Pet. App. at 11a-15a. These included the inapplicability of the state-law exclusionary rule to the charges of capital murder and aggravated arson (because the State's own evidence of those crimes was circumstantial), Pet. App. at 15a, and the constitutional requirements of due process and confrontation (which came into play when Pusch testified against Mr. Marsh at trial), Pet. App. at 15a-16a. Applying constitutional harmless-error analysis, the Kansas Supreme Court was "not prepared to say beyond a reasonable doubt that the district court's error had little, if any, likelihood of altering the jury's determination that Marsh committed capital murder." Pet. App. at 17a.

## II.

While Mr. Marsh's case was pending on direct appeal, the Kansas Supreme Court issued its decision in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), Pet. App. at 79a-142a. The briefing schedule in Mr. Marsh's appeal had been stayed by the court pending the decision in *Kleypas*, with which Mr. Marsh's case had several common issues. J.A. at 30-33. One of those issues was a challenge to the

constitutionality of the equipoise formula in KAN. STAT. ANN. § 21-4624(e).[2]

In *Kleypas*, the Kansas Supreme Court declared § 21-4624(e) unconstitutional as written, under the Eighth and Fourteenth Amendments. Pet. App. at 87a-88a, 96a-115a. After an exhaustive analysis of the constitutional claim in light of this Court's caselaw relating to capital sentencing, the *Kleypas* court held:

> "We see no way that the weighing equation in [§] 21-4624(e), which provides that in doubtful cases the jury must return a sentence of death, is permissible under the Eighth and Fourteenth Amendments. We conclude [§] 21-4624(e) as applied in this case is unconstitutional." (Pet. App. at 115a.)

In reaching this conclusion, the *Kleypas* court carefully considered whether *Walton v. Arizona*, 497 U.S. 639 (1990), resolved the constitutional claim with respect to the Kansas statute. The issue had been extensively briefed by both parties, as well as an *amicus*. J.A. at 59-107 (*Kleypas* briefing). The court examined the plain language of the Kansas statute and found it distinguishable from the Arizona statute at issue in *Walton*:

> "The obvious distinction is the language used in each statute. The Arizona statute does not call for a weighing formula in which the mitigating circumstances must outweigh the aggravating circumstances, the very essence of the issue before

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[2] Mr. Marsh's constitutional challenge to the equipoise formula had been denied in the trial court. J.A. at 21. At the trial level, the State of Kansas argued that the formula was constitutional under *Walton v. Arizona*, 497 U.S. 639 (1990). J.A. at 8-13.

> this court. Such a weighing equation results in mandating a death sentence where the jury finds equipoise as to the mitigating and aggravating circumstances." (Pet. App. at 102a-103a.)

Although the *Kleypas* court found the Kansas statute unconstitutional as written, it held that the provisions authorizing a sentence of death could be saved "by simply invalidating the weighing equation" and construing the statute to read, "[I]f the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances ... exists and, further, that such aggravating circumstance or circumstances outweigh any mitigating circumstances found to exist, the defendant shall be sentenced to death[.]" Pet. App. at 119a. The court thus ordered the *Kleypas* case remanded for a new penalty trial under the judicially reconstructed sentencing formula. *Id.*[3]

Mr. Marsh filed his appellate brief in the Kansas Supreme Court a few months after the *Kleypas* decision. He argued that, at the very least, his death sentence must be set aside and his case remanded for a new penalty trial pursuant to the *Kleypas* holding that the statutory equipoise formula was unconstitutional as written. However, he also argued that the disposition in *Kleypas* was contrary to the disposition required by Kansas statutory law (KAN. STAT. ANN. § 21-4629), which entitled him to be resentenced to life imprisonment if a provision of the

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[3] Mr. Kleypas' motion for rehearing on the judicial reconstruction issue was denied. The State filed no request for rehearing, nor did it respond to Kleypas' motion. Kleypas' petition for *certiorari* arguing that state law created a due process liberty interest in a life sentence once the statutory equipoise formula was held unconstitutional, was denied. *Kleypas v. Kansas*, 537 U.S. 834 (2002). No response or cross-petition for *certiorari* was filed by the State.

state's death penalty law was held unconstitutional. In addition, he argued that, under well-established rules of statutory construction and Kansas separation-of-powers doctrine, the *Kleypas* court was wrong in reconstructing the statutory weighing formula after declaring it unconstitutional. Accordingly, Mr. Marsh argued, the portion of the *Kleypas* decision that saved the statute through judicial reconstruction should be overruled. J.A. at 34-38.

In its brief on appeal filed nearly one year later, the State abandoned its earlier arguments in *Kleypas* and at the trial-court level in *Marsh* that the Kansas equipoise formula was constitutional under *Walton v. Arizona*. Instead, the State specifically conceded that the formula as written was unconstitutional:

> "In *Kleypas*, *supra*, this Court found the application of the weighing equation in [§] 21-4624(e) with respect to aggravating and mitigating factors to be unconstitutional when such application could result in the imposition of a death sentence when the aggravators and mitigators were found to be in equipoise. 40 P.3d at 232. Because Defendant's death sentence was imposed as a result of the same unconstitutional application of [§] 21-4624(e) as occurred in *Kleypas*, the State concedes that his sentence must be set aside and his case remanded for resentencing in accordance with the *Kleypas* decision. 40 P.3d at 234." (J.A. at 40.)

The State of Kansas went on to argue that state law did not prohibit reimposition of the death penalty on remand, and that the *Kleypas* court's reconstruction of the statute to require that aggravating circumstances outweigh mitigating circumstances was within the court's lawful

authority and did not violate Kansas' separation-of-powers doctrine. J.A. at 41-44.

In its decision in Mr. Marsh's case, the Kansas Supreme Court explained that it had held in *Kleypas* that the statutory equipoise formula was unconstitutional as written under the Eighth and Fourteenth Amendments, but "we avoided striking the statute down as unconstitutional on its face . . . by construing it to mean the opposite of what it said, *i.e.*, to require aggravating circumstances to outweigh mitigating circumstances." Pet. App. at 18a. The Kansas Supreme Court then described the issue it was presented with in this case:

> "Here, Marsh correctly notes, and the State concedes, that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions on the weighing equation. Marsh makes the further argument, however, that [§] 21-4624(e) is unconstitutional on its face and that the portion of our *Kleypas* decision that saved the statute through judicial construction must be overruled." (Pet. App. at 19a.)

The Kansas Supreme Court's majority opinion began by reciting the relevant portions of the *Kleypas* decision which "succinctly summarized" why the statutory weighing equation "as written did not comport with the Eighth and Fourteenth Amendments." Pet. App. at 19a-20a. "After full reconsideration," the majority rejected an invitation from two of the dissenters to "revisit" the constitutionality of the statute as written, stating that the court would "continue to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) as written is unconstitutional

under the Eighth and Fourteenth Amendments." Pet. App. at 20a-21a.

The Kansas Supreme Court went on to conclude in the present case that, in reconstructing the statutory equipoise formula to mean the opposite of what it said, the *Kleypas* court had misapplied the constitutional avoidance doctrine, because that doctrine "is applied appropriately *only* when a statute is ambiguous, vague, or overbroad" and "[t]he court's function is to interpret legislation, not rewrite it." Pet. App. at 24a. The error in *Kleypas*, the court found, was that the *Kleypas* majority had failed to apply the fundamental rule of statutory construction set forth in its own precedent – that "'when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute,'" Pet. App. at 21a-22a – before moving to the canons that support the avoidance doctrine, Pet. App. at 24a. The court observed that one of the dissenters in *Kleypas* had stressed this very point in arguing that, by adopting language "exactly the opposite of what the legislature stated," the *Kleypas* majority had invaded the province of the legislature. Pet. App. at 25a (*Marsh* decision); Pet. App. at 120a-121a (*Kleypas* decision) (Davis, J., dissenting). The court agreed with that reasoning, and concluded below that "[t]he appropriate, limited judicial response to the problem identified for the first time in *Kleypas* was to hold K.S.A. 21-4624(e) unconstitutional on its face and let the legislature take such further action as it deemed proper." Pet. App. at 26a. That conclusion, the court held, required it "to overrule that portion of *Kleypas* upholding the statute through application of the avoidance doctrine." Pet. App. at 28a. The court further held that

principles of *stare decisis* did not prevent it overruling *Kleypas* because the *Kleypas* court's application of the avoidance doctrine was not "fully vetted" and its rewriting of the statute "was not only clearly erroneous; as a constitutional adjudication, it encroached upon the power of the legislature." Pet. App. at 28a-31a.

Following the Kansas Supreme Court's decision in Mr. Marsh's case, the State of Kansas filed a motion for rehearing. The sole argument in the motion was that § 21-4624(e) could be "saved" by severing the unconstitutional equipoise provision from the remainder of the statute. By striking "three words and a suffix," the State argued, the statute would read to require that aggravating circumstances outweigh mitigating circumstances before a death sentence can be imposed. J.A. at 45-55. Mr. Marsh replied that the State's argument called for the same rewriting of the plain and unambiguous statutory language that had required the court to overrule the part of *Kleypas* purporting to save the statute through judicial reconstruction. J.A. at 56-58. The Kansas Supreme Court denied the State's motion. Pet. App. at 78a.

## SUMMARY OF ARGUMENT

The State's contention that the decision below is a final judgment under 28 U.S.C. § 1257 depends upon its assertion that it will have no right of appeal if it is precluded from seeking a death sentence against Mr. Marsh on remand. Kansas law regarding the State's appeal rights is unclear. To clarify it, this Court would have to certify a question of state procedure to the Kansas Supreme Court.

However, recourse to a certified question would be improvident because this Court lacks jurisdiction in any event. A sufficient bar to its jurisdiction is that the decision of the Kansas Supreme Court in Mr. Marsh's case rests upon an adequate and independent state ground. It is clear that that court in *Marsh* decided only the state-law issue of the severability of KAN. STAT. ANN. § 21-4624(e) and not the issue of the federal constitutionality of § 21-4624(e), which had been resolved definitively in the earlier *Kleypas* case. In Mr. Marsh's case, both the parties and the Kansas Supreme Court treated the federal unconstitutionality of § 21-4624(e) as having been settled by the *Kleypas* decision. The Kansas Supreme Court's reiteration of the *Kleypas* holding in the *Marsh* opinion as a prelude to severability analysis does not constitute the decision of a federal question.

On the merits, the Kansas Supreme Court was correct in holding (in *Kleypas*) that the unique Kansas equipoise provision violates the Eighth Amendment because it absolves sentencing juries from the obligation to make a collective, reliable sentencing decision based upon the individual characteristics of the defendant and the particular circumstances of his or her offense. When a jury is in equipoise regarding the aggravating and the mitigating features of a case, it is by definition unable to reach any conclusions about the defendant "as [a] uniquely individual human being[]" that would distinguish him or her from any of the other "members of a faceless, undifferentiated mass" of death-eligible defendants. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). A statutory jury instruction to return a death verdict on such a basis flouts the Eighth Amendment requirement of individualized capital sentencing.

*Walton v. Arizona* does not speak to this issue, because the Arizona statute involved in *Walton* did not mandate death by equipoise. The Kansas statute is currently unique in requiring a death sentence when jurors are unable to say one way or the other whether the defendant deserves death. There have been a few statutes like it in the past, but every court that has ever considered a statutory provision capable of such a construction has voided or avoided it.

## ARGUMENT

### I. This Court Lacks Jurisdiction of the Case Purportedly Presented by the State's Petition for *Certiorari*.

In granting *certiorari*, the Court directed the parties to address two jurisdictional questions: (A) "Does this Court have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U.S.C. Sec. 1257, as construed by *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?" and (B) "Was the Kansas Supreme Court's judgment adequately supported by a ground independent of federal law?"

Respondent believes that the answer to the first question depends upon an unsettled point of Kansas procedure. To decide the question, this Court would need the guidance of the Kansas Supreme Court. It could obtain such guidance by certifying a question to that court. See the following section I.A.

However, certification would be a wasteful expenditure of this Court's resources and those of the Kansas Supreme Court, because this Court lacks jurisdiction of

the case purportedly framed by the State's petition for *certiorari* for two reasons that do not depend on the answer to its question (A). First, the answer to the Court's question (B) is that the decision of the Kansas Supreme Court does rest upon an adequate and independent state-law ground. See section I.B below. Second, as Respondent Marsh noted in his Brief in Opposition to Petition for a Writ of Certiorari previously filed, the rule of *Illinois v. Gates*, 462 U.S. 213 (1986), forecloses jurisdiction because the State of Kansas did not present to the Kansas Supreme Court in Mr. Marsh's case the question which it is asking this Court to decide in Mr. Marsh's case. Mr. Marsh respectfully refers the Court to his Brief in Opposition and to the Reply Brief for Petitioner (at the *certiorari* stage) for the parties' briefing of the latter point.

(The State's merits brief takes the position that the Court "has 'necessarily considered and rejected'" the *Gates* bar to its jurisdiction because it "granted *certiorari*" after studying the BIO. The State cites *United States v. Williams*, 506 U.S. 36, 40 (1992), for this proposition. See Pet. Br. at 6 n.3. Of course, in *Williams* the Court granted *certiorari* without reserving any questions about its jurisdiction, see 502 U.S. 905 (1991), and thus indicated that it had already resolved all such questions, whereas here the Court has expressly carried jurisdictional issues with the case. The present form of *cert.* grant does not "'necessarily'" indicate rejection of any objections to the Court's jurisdiction, and only the Court itself can know whether, in specifying two such possible objections for future briefing, it was indicating (1) that it had actually decided the *Gates* question or (2) that it saw no need for redundant briefing of that question in the light of the BIO and Petitioner's Reply Brief. Respondent Marsh would not

presume to instruct the Court on the state of its own deliberations but will rely upon the briefing already submitted with respect to *Gates* and be prepared to address whatever jurisdictional issues the Court wishes to hear discussed in oral argument.)

### A. Whether the Decision of the Kansas Supreme Court below Is Final for Purposes of Giving this Court Jurisdiction under 28 U.S.C. § 1257 Depends upon the Answer to a Question of State Procedure that Should Be Certified to the Kansas Supreme Court if this Court's Jurisdiction Were Otherwise Well Founded.

This Court has jurisdiction under 28 U.S.C. § 1257(a) only if the decision of the Kansas Supreme Court below constitutes a final judgment. "Applied in the context of a criminal prosecution, finality is normally defined by the imposition of . . . sentence." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). And "[s]ince its establishment, it has been a marked characteristic of the federal judicial system not to permit an appeal until a litigation has been concluded in the court of first instance." *Radio Station WOW, Inc., v. Johnson*, 326 U.S. 120, 123 (1945). However, as this Court's question to the parties regarding *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), suggests, there are exceptions to the latter rule, and *Cox* provides a compendium of them, grouped into four categories.

Of the four categories, only one is potentially relevant in the present case. The State invokes only that one. See Pet. Br. at 8. It is *Cox Broadcasting*'s third category, having to do with "those situations where the federal claim has been finally decided, with further proceedings on the

merits yet to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting*, 420 U.S. at 481.

In dealing with this third category it is important to remember that *Cox Broadcasting*'s language describing the category is not a complete inventory of the elements necessary to bring a case within it. The mere fact that "later review of the federal issue cannot be had" does not suffice. What is necessary is that later review of the federal issue cannot be had *at the instance of a party who will continue to be injured in some judicially cognizable way by the adverse decision* which the party is asking this Court to review. If the "further proceedings on the merits" ahead will leave the party *uninjured* in the outcome, "whatever the ultimate outcome of the case," then the case is not within the third *Cox Broadcasting* category. Nor is it within Article III of the Constitution. It is, quite simply, a request for an advisory opinion.[4]

In *Jefferson v. City of Tarrant*, 522 U.S. 75, 83 (1997), for example, the petitioners sued an Alabama municipality for damages for their decedent's death, pleading two state-law claims, wrongful death and the common-law tort of outrage, and a federal claim under 42 U.S.C. § 1983. This Court initially granted *certiorari* to review the Alabama Supreme Court's pretrial determination that the State's wrongful death statute governed potential recovery under §1983 – a determination that would preclude any recovery

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[4] See *United Public Workers v. Mitchell*, 330 U.S. 75, 89 (1947): "As is well known the federal courts established pursuant to Article III of the Constitution do not render advisory opinions. For adjudication of constitutional issues, 'concrete legal issues, presented in actual cases, not abstractions,' are requisite." (Footnotes omitted.)

of damages by the Jefferson plaintiffs. However, upon full consideration, the Court dismissed *certiorari* on the ground that the Alabama Supreme Court's judgment was not final for purposes of 28 U.S.C. § 1257 because, "[r]esolution of the state-law claims [by a finding in favor of the city on the facts at the trial yet to come] could effectively moot the federal-law question raised here." 522 U.S. at 83. The Court explained that "[i]f the city prevails on . . . [its] account of the facts, then any §1983 claim will necessarily fail, however incorrect the Alabama Supreme Court's ruling, for the City will have established that its actions did not cause Mrs. Jefferson's death." *Id.* Although such a disposition at trial would leave the Jefferson plaintiffs unable to seek later review of the federal issue, it would also leave them uninjured by the Alabama Supreme Court's decision of the issue. On the other hand:

> "If the Alabama Supreme Court's decision on the federal claim ultimately makes a difference to the Jeffersons – in particular, if they prevail on their state claims but recover less than they might have under federal law, or if their state claims fail for reasons that do not also dispose of their federal claims – they will be free to seek our review once the state-court litigation comes to an end. Even if the Alabama Supreme Court adheres to its interlocutory ruling as 'law of the case,' that determination will in no way limit our ability to review the issue on final judgment." (*Id.* at 82-83.)

*Accord*: *O'Dell v. Espinoza*, 456 U.S. 430 (1982); *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981).

The Court reasoned similarly in *Florida v. Thomas*, 532 U.S. 774 (2001). There, a state trial court had suppressed prosecution evidence on the ground that it was the product of a federally unconstitutional police search, rejecting the prosecutor's theory that the search was valid under the automobile-search rule of *New York v. Belton*, 453 U.S. 454 (1981). The Florida Supreme Court upheld the trial court's *Belton* ruling but remanded for a determination whether the search was valid on a different theory – one based upon the search-incident-to-arrest rule of *Chimel v. California*, 395 U.S. 752 (1969). This Court granted review on the *Belton* issue and then dismissed the case on the ground that the Florida Supreme Court's judgment was not final:

> "If the State prevails on remand and the evidence is admitted under *Chimel*, then the *Belton* issue will be moot, and the State cannot seek review of it. But if the State loses, and the evidence is suppressed, Florida law allows the State to appeal, as long as it does so prior to trial." (532 U.S. at 780.)

The *Thomas* Court distinguished *New York v. Quarles*, 467 U.S. 649 (1984), in which a pretrial ruling of New York's highest court ordering the suppression of evidence on federal Fourth Amendment grounds was held final. In *Quarles*, the Court had found that:

> "'should the State convict respondent at trial, its claim that certain evidence was wrongfully suppressed will be moot. Should respondent be acquitted at trial, the State will be precluded from pressing its federal claim again on appeal.'" (532 U.S. at 779, quoting 467 U.S. at 651 n. 1.)

*Quarles* is the prototype of the line of cases on which the State of Kansas here relies to argue that the Kansas Supreme Court's decision below is final within 28 U.S.C. § 1257: *California v. Stewart*, 384 U.S. 436, 498 n.71 (1966) (involving suppression of a confession); *South Dakota v. Neville*, 459 U.S. 553, 555 (1983) (same); *Quarles* (involving suppression of a confession and a handgun); *Florida v. Meyers*, 466 U.S. 380 (1984) (involving suppression of physical evidence). See Pet. Br. 10-11. In all of these cases, as in *Jefferson*, *O'Dell*, *San Diego Gas & Electric* and *Thomas*, the Court projected two possible future developments of a case on remand by a state appellate court – one which would moot the federal issue and one in which the state appellate court's decision of the federal issue would adversely affect the party who was asking this Court to review it. It was not the inability of that party to secure later review of the issue *in the event of mootness* which brought the *Quarles* line of cases within *Cox Broadcasting*'s third category. Mootness-caused inability-to-secure-later-review was common to *both* the line of cases held non-final under § 1257 and the line of cases held final. The difference between the lines was that in the cases held final, the federal issue would not be susceptible to review *on the contingency under which the state appellate court's decision of the issue would adversely affect the party who was asking this Court to review it.* Specifically, in the evidence-suppression cases, the prosecution would be required "to go to trial without the suppressed evidence," *Thomas*, 532 U.S. 779, and might lose a conviction *for that reason*, in which event it would not be able to appeal.

In the present case of Mr. Marsh, the Kansas Supreme Court (1) reversed his conviction for improper exclusion of

exculpatory evidence and awarded him a new trial on the issue of guilt or innocence (and degree of murder), and (2) held that he could not be sentenced to death if convicted of capital murder. We have just seen that the State's inability to obtain review of the holding numbered (2) in the event that Mr. Marsh is acquitted of capital murder on retrial does not make the Kansas Supreme Court's decision a final judgment, because the holding numbered (2) does not exclude any prosecution evidence or have any other legally cognizable adverse effect on the prosecution's case *at the guilt-or-innocence stage of the trial*. If the Kansas Supreme Court's decision is a final judgment within the third *Cox Broadcasting* category, it must be because the State will be unable to obtain review of the holding numbered (2) – the holding eliminating death as a possible penalty for Mr. Marsh – if Mr. Marsh is *convicted* of capital murder on retrial.

Will the State be able to obtain review on this contingency? Its brief asserts that it will not (Pet. Br. at 7, 8-9) but fails to document that assertion as a matter of Kansas law. Counsel for respondent Marsh have researched the question under Kansas law and have found no answer. Presumably, the way in which the State apprehends that it will be barred from seeking a death sentence against Mr. Marsh on retrial is that, when the parties return to the trial court, that court will remove the death penalty from the case by some ruling it is bound to make in obedience to the decision of the Kansas Supreme Court below – by, for example, striking the death penalty notice that the prosecution filed against Mr. Marsh under KAN. STAT. ANN. § 21-4624(a). As this Court knows, a similar ruling by a federal district court would be appealable under the Criminal Appeals Act (18 U.S.C. § 3731). *United States v. Bass*, 536

U.S. 862 (2002). Kansas has a parallel statute (KAN. STAT. ANN. § 22-3602(b)(1)), which has never been relevantly construed. Therefore, the only way in which this Court could determine whether it has jurisdiction in Mr. Marsh's case consistently with the restriction of 18 U.S.C. § 1257 and the Court's precedents would be to certify to the Kansas Supreme Court the controlling state-law question whether, indeed, the State could obtain review of a trial-court decision removing the death penalty from the case on remand. The Kansas Supreme Court has jurisdiction to answer such a certified question under KAN. STAT. ANN. § 60-3201.

### B. In any Event, this Court Lacks Jurisdiction Because the Decision below Rests upon an Adequate, Independent State-Law Ground.

Respondent respectfully suggests it would be improvident to waste this Court's time and that of the Kansas Supreme Court by resorting to the certified-question procedure just mentioned. For wholly different reasons than non-finality, this Court is without jurisdiction. One sufficient obstacle to its jurisdiction is that the decision of the Kansas Supreme Court in Mr. Marsh's case rests upon an adequate and independent state-law ground.

"This Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment. See, *e.g.*, *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 . . . (1935). . . ." *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). "[A]n adequate and independent state procedural disposition strips this Court of certiorari jurisdiction to review a state court's judgment. . . ." *Dretke v. Haley*, 541 U.S. 386, 392 (2004);

see, *e.g.*, *Murdock v. Memphis*, 20 Wall. (87 U.S.) 590 (1874); *Loftus v. Illinois*, 334 U.S. 804, 805 (1948); *cf. Adams v. Robertson*, 520 U.S. 83 (1997).

The Court has found that "[i]t is not always easy . . . to apply the independent and adequate state ground doctrine." *Coleman*, 501 U.S. at 732. Examples of situations presenting difficult problems of interpretation are state-court opinions which "discuss federal questions at length and mention a state law basis for decision only briefly" and opinions "purporting to apply state constitutional law . . . [that] derive principles by reference to federal constitutional decisions from this Court." *Id.* To deal with such situations, the Court has created the rule of *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983), which presumes that a state-court decision that "fairly appears to rest primarily on federal law, or to be interwoven with the federal law" does constitute a reviewable decision of a federal-law issue unless "the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion." See also *Harris v. Reed*, 489 U.S. 255, 263-266 (1989). Consonantly with its purpose to "reach the correct result most of the time" (*Coleman*, 501 U.S. at 737), the *Long-Harris* "facially-clear" rule applies only when "the relevant state court decision . . . fairly appear[s] to rest primarily on federal law or to be interwoven with such law," *Coleman*, 501 U.S. at 740; and see *Ylst v. Nunnemaker*, 501 U.S. 797, 802-804 (1991).

In the present case, the selfsame circumstances simultaneously satisfy the *Long-Harris* "facially-clear" rule and make the application of that rule unnecessary in the first place under *Coleman* and *Ylst*. The opinion of the Kansas Supreme Court below is exquisitely articulate and

crystal clear about exactly what it does and does not decide. It says explicitly that:

(1) The question of the federal constitutionality of Kansas's equipoise provision, § 21-4624(e), was decided in the case of *State v. Kleypas*, which was handed down before the Kansas Supreme Court considered *State v. Marsh*. Pet. App. at 18a.

(2) In *State v. Marsh*, the unconstitutionality of § 21-4624(e) was accepted by both the State and Mr. Marsh, and was no longer in contest. Pet. App. at 19a.

(3) The only issue relating to § 21-4624(e) which was contested or decided in the *Marsh* appeal was whether that section was severable from the remainder of Kansas's death-penalty statute. Pet. App. at 19a.

(4) Three dissenting Justices in *Marsh* sought to have the Court revisit the issue of the constitutionality of § 21-4624(e) as written, but, after full reconsideration, the *Marsh* majority continued to adhere to the decision in *Kleypas* insofar as the federal constitutionality of § 21-4624(e) was concerned. Pet. App. at 19a-21a.

(5) The *Marsh* majority did, however, revisit the portion of the decision in *Kleypas* that had insulated the Kansas death-penalty statute as a whole from invalidation by severing the equipoise provision of § 21-4624(e). Pet. App. at 21a.

(6) The *Marsh* majority relied on state-law intent-of-the-legislature and separation-of-powers concepts to overrule that portion of

*Kleypas*, and it accordingly held § 21-4624(e) inseparable and the entire statute invalid. Pet. App. at 21a-28a.

(7) Finally, the *Marsh* majority examined and rejected the argument that the doctrine of *stare decisis* forbade it to overrule that portion of *Kleypas*. Pet. App. at 28a-31a.

If anything further needed to be said to clarify that the Kansas Supreme Court in *State v. Marsh* decided only the state-law issue of the severability of § 21-4624(e) and not the issue of the federal constitutionality of § 21-4624(e) which had been resolved definitively in *State v. Kleypas*, the Kansas Supreme Court said it in the syllabi of the two cases. In Kansas, syllabi are written by the court and state the points of law that are determined by the court. KAN. STAT. ANN. § 20-203. The relevant paragraphs of the *Kleypas* syllabus read:

> "43. In a capital case, the fundamental respect for humanity underlying the Eighth Amendment to the United States Constitution requires that the sentencer be able to consider the character and record of the individual defendant and the circumstances of the particular offenses as a constitutional, indispensable part of the process of imposing the death penalty.
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> "44. In a capital case, the defendant must not only be allowed to present mitigating circumstances, but the sentencer must also be able to consider and give effect to the mitigating circumstances in imposing the death sentence.
>
> "45. K.S.A. 21-4624(e) is not unconstitutional on its face, but it impermissibly mandates the death penalty where the jury finds that the mitigating and aggravating circumstances are in

> equipoise. As such, it denies what the Eighth Amendment requires: that the jury is to give effect to the mitigating circumstances that it finds exist." (Pet. App. at 87a-88a.)

By contrast, the relevant paragraphs of the *Marsh* syllabus read:

> "18. It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted. When a statute is plain and unambiguous, the court must give effect to the intention of the legislature as expressed, rather than determine what the law should or should not be. Stated another way, when a statute is plain and unambiguous, the appellate courts will not speculate as to the legislative intent behind it and will not read such a statute so as to add something not readily found in the statute.
>
> ". . . . . .
>
> "21. The courts' power to employ the avoidance doctrine to construe away a statute's constitutional infirmity is limited. The judiciary may not rewrite language enacted by the legislature. Rather, the doctrine applies only when a statute is ambiguous, vague, or overbroad.
>
> ". . . . . .
>
> "25. K.S.A. 21-4624(e) is unambiguous. Its express language was clearly intended to mandate the imposition of a death sentence when the existence of aggravating circumstances was not outweighed by any mitigating circumstances. The

> legislature chose this language over alternative wording recommended by the attorney general to avoid constitutional infirmity. *As a result*, the statute is unconstitutional on its face under the Eighth and Fourteenth Amendments.
>
> "26. The avoidance doctrine cannot be appropriately applied to save K.S.A. 21-4624(e). Any holding to the contrary in *State v. Kleypas*, 272 Kan. 894, 40 P.3d 139 (2001), is overruled." (Pet. App. at 3a-6a; emphasis added.)

It understates the matter to say that the primary focus of the Kansas Supreme Court's decision in *Marsh* is the severability of K.S.A. 21-4624(e) – which is "only a state-law question"[5] – not the federal constitutionality of K.S.A. 21-4624(e) – which is the sole issue that the State of Kansas and its *amici* are urging this Court to decide. Except for a single passage in the Kansas Supreme Court opinion, the severability of K.S.A. 21-4624(e) is the *exclusive* focus of the Kansas Supreme Court's *Marsh* opinion. The single passage constituting the exception is the one in which the *Marsh* majority – in responding to arguments made by dissenting Justices and not to any contention by the State of Kansas that the constitutional invalidation of K.S.A. 21-4624(e) in *State v. Kleypas* was wrong or should be overruled – says that "[a]fter full reconsideration," it "continue[s] to adhere to the *Kleypas* majority's reasoning and holding that K.S.A. 21-4624(e) is unconstitutional under the Eighth and Fourteenth Amendments" (Pet. App. at 21a). But this passage merely reiterates the

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[5] *City of New Orleans v. Dukes*, 427 U.S. 297, 302 (1976). See, *e.g.*, *Dorchy v. Kansas*, 264 U.S. 286, 325 (1924), *followed in Bell v. Maryland*, 378 U.S. 226, 239-241 (1964).

*Kleypas* holding and declines the dissenters' invitations to "revisit the constitutionality of K.S.A. 21-4624(e)" (Pet. App. at 20a). And this Court has long held that such a reiteration does not constitute the decision of a federal question, making it subject to review here, because "the fact that in . . . [a state supreme court] opinion the construction and [federal constitutional] validity of the statute were treated as settled by the ruling in the earlier case . . . and were restated by way of explanation of . . . [an issue in] the present case, fall short of showing that there was any real contest at any stage of this case upon the point." *Morrison v. Watson*, 154 U.S. 111, 115 (1894), *approved in Illinois v. Gates*, 462 U.S. 213, 222 (1983). Moreover, since the Kansas Supreme Court noted that "the State concedes . . . that *Kleypas* requires us to vacate Marsh's death sentence and remand for reconsideration of the death penalty under proper instructions" (Pet. App. at 19a), any reconsideration of *Kleypas* that the *Marsh* majority might have undertaken would be, at most, an alternative ground of decision incapable of supporting this Court's jurisdiction.[6] *Radio Station WOW, Inc.*, 326 U.S. at 128-129.

Article III of the Constitution and 28 U.S.C. § 1257 confer jurisdiction on this Court to hear cases and controversies in which a state's highest court has decided a contested question of the federal constitutionality of a

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[6] In Kansas, a litigant is not permitted to change its position, first conceding a point and then contesting it, as the litigation goes along. See, *e.g.*, *Harmon v. James*, 69 P.2d 690, at 690 (Kan. 1937); *Rose v. Helstrom*, 277 P.2d 633, 634 (Kan. 1954); *Manhattan Bible College v. Stritesky*, 387 P.2d 225, 226 (Kan. 1963); *Popp v. Popp*, 461 P.2d 816, 817 (Kan. 1969); *State v. Murphy*, 91 P.3d 1232, 1233 (Kan. 2004); *State v. Reed*, 77 P.3d 153, 154 (Kan. Ct. App. 2003).

state statute.[7] *State v. Kleypas* was such a case. *State v. Marsh* is not. In *State v. Marsh* the Kansas Supreme Court discussed the federal constitutional invalidation of KAN. STAT. ANN. § 21-4624(e) in *Kleypas* only as the predicate for an extended, intensive analysis of state-law issues of severability and *stare decisis*. The decision of the latter issues in Mr. Marsh's case are adequate, independent grounds for the Kansas court's holding that the federal constitutional premise laid in *Kleypas* (the unconstitutionality of § 21-4624(e)) required the state-law consequence declared in *Marsh* (striking the statute as a whole so as to return the subject to the legislature). Therefore, this Court lacks jurisdiction.

[7] See, *e.g.*, *Webb v. Webb*, 451 U.S. 493, 498-502 (1981) and cases cited.

## II. The Kansas Capital-Sentencing Formula that Forces a Jury to Return a Sentence of Death when Aggravating and Mitigating Factors are in Equipoise Fails to Distinguish Rationally Between Individuals for whom Death is an Appropriate Punishment and Those for Whom it is Not, and Thus Creates a Risk of Unreliability in Capital Sentencing that Is Forbidden by the Eighth Amendment.

### A. At the Selection Stage of the Capital-Sentencing Process, The Eighth Amendment Requires a State to Assure that the Jurors Will Reach a Reliable, Responsible, Collective Judgment as to Whether Death is the Appropriate Punishment in Light of the Unique Characteristics of the Individual Defendant and the Particular Circumstances of the Crime.

The Eighth Amendment rules regulating state capital-sentencing procedures derive indirectly from *Furman v. Georgia*, 408 U.S. 238 (1972), and directly from the 1976 decisions – *Gregg v. Georgia*, 428 U.S. 153, and companion cases – approving some forms of procedure and disapproving others.[8] The essence of those rules, as the Court has repeatedly taught, is that "[i]f a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom

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[8] The *amicus* brief of the States of Arizona *et al.* covertly invites the Court to overrule the entire body of contemporary Eighth Amendment law (pp. 10-18). We will not address that invitation, confident that if the Court were to consider such a radical proposal – particularly in a case in which no party has argued anything of the sort – it would call for briefing on the issue.

death is an appropriate sanction and those for whom it is not." *Spaziano v. Florida*, 468 U.S. 447, 460 (1984).

In applying that precept, the Court's "capital punishment cases under the Eighth Amendment address two different aspects of the capital decisionmaking process: the eligibility decision and the selection decision." *Tuilaepa v. California*, 512 U.S. 967, 971 (1994). The parties in the present case have no real disagreement about the rules governing the eligibility decision.[9] However, the State of Kansas and its *amici* base their arguments upon a fundamental misconception of the Eighth Amendment rules governing the selection decision – the rules embodying "the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases," *Stringer v. Black*, 503 U.S. 222, 230 (1992). This misconception needs to be addressed at the outset.

The State asserts that the Kansas statute satisfies the requirement of individualized sentencing determinations "because it places no restriction, other than relevancy, on the admission of any evidence relating to any mitigating circumstances." Pet. Br. at 22. The premise of its argument is that "once the class of death eligible defendants is appropriately narrowed [at the eligibility-decision stage], . . . all that the Constitution requires . . . [is] that the sentencer be allowed to consider any relevant evidence." *Id.* at 22. This is also the core of the constitutional arguments

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[9] A terse summary of these rules is found in *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980), paraphrased at Pet. Br. 20: a capital-sentencing statute must "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'"

by the State's *amici*. See Brief of the States of Arizona *et al.* at 7 (reducing the Eighth Amendment individualization requirement to a rule that "a sentencer must be allowed to consider, and give effect to, any mitigating evidence"); Brief of the Criminal Justice Legal Foundation at 14-15 (same). Such a *reductio* of the Eighth Amendment individualization requirement is simply incorrect. To understand how wrong it is – and why – "[i]t is important to examine once again the establishment of the individualized capital-sentencing doctrine in this Court's opinions issued in 1976 and the [subsequent] development of that doctrine." *Sumner v. Shuman*, 483 U.S. 66, 73 (1987).

The individualization doctrine is rooted in the perception that "[b]ecause of ... [the] qualitative difference [between death and lesser punishments], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (opinion of Justices Stewart, Powell and Stevens).[10] To avoid "disproportionality of death as a penalty for ... [the defendant's] own conduct ... [, t]he focus must be on his culpability,"[11] ... for we insist on

[10] *Accord*: *e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 601 (1978) (plurality opinion of Chief Justice Burger) (the *Woodson* plurality insisted upon individualized consideration of the offender and the offense "in order to ensure the reliability, under Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case'" [quoting *Woodson*, 428 U.S. at 305]); *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985) (quoting the same passage).

[11] The point that the selection decision in capital cases must *focus* on the defendant's individual, personal culpability is no innovation of *Enmund*. Earlier, the Court had upheld Florida's capital-sentencing procedure in a plurality opinion observing that the "trial court's sentencing discretion is guided and channeled by a system that focuses

(Continued on following page)

'individualized consideration as a constitutional requirement in imposing the death sentence,' *Lockett v. Ohio*, 438 U.S. 586, 605 . . . (1978) . . . , which means that we must focus on 'relevant facets of the character and record of the individual offender.' *Woodson v. North Carolina*, 428 U.S. . . . [at] 304." *Enmund v. Florida*, 458 U.S. 782, 798 (1982). The Court has never departed from this root principle.[12]

"The constitutional mandate of individualized determinations in capital-sentencing proceedings . . . had a significant impact on . . . [the Court's] decisions in cases where the sentencing authority's consideration of mitigating circumstances had been restrained in some manner." *Sumner*, 483 U.S. at 75. In those cases, it generated a corollary doctrine "that in order to give meaning to the individualized-sentencing requirement in capital cases, the sentencing authority must be permitted to consider 'as a mitigating factor, any aspect of a defendant's character

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on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed." *Proffit v. Florida*, 428 U.S. 242, 251-252 (1976) (opinion of Justices Stewart, Powell and Stevens). And Texas's capital-sentencing statute had been upheld in a plurality opinion which was careful to note that "the Texas capital-sentencing procedure guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death." *Jurek v. Texas*, 428 U.S. 262, 273-274 (1976) (opinion of Justices Stewart, Powell and Stevens).

[12] See, *e.g.*, *Roper v. Simmons*, 125 S. Ct. 1183, 1197 (2005) ("[a] central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender"); *Deck v. Missouri*, 125 S.Ct. 2007, 2014 (2005) (referring to the selection decision as a " 'unique, individualized judgment regarding the punishment that a particular defendant deserves' " [quoting Justice Rehnquist's concurring opinion in *Zant v. Stephens*, 462 U.S. 862, 900 (1983)]).

or record and any of the circumstances of the offense.'" *Sumner*, 483 U.S. at 75-76, quoting *Lockett*, 438 U.S. at 601. But the individualization requirement has never been *limited* to that corollary doctrine or held *satisfied* simply because a State permits its sentencing juries to consider evidence in mitigation before voting for life or death. The reason *why* "[t]he selection decision . . . must be expansive enough to accommodate relevant mitigating evidence [is] so as to assure *an assessment of the defendant's culpability*." *Tuilaepa*, 512 U.S. at 973 (emphasis added). Not only must the selection decision in capital cases be reached through a process that assures "an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case," *Sumner*, 483 U.S. at 78; the process must also assure that the sentencer actually makes that ultimate determination. "What is important at the selection stage is an individualized determination on the basis of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. 862, 879 (1983). *Accord*: *Tuilaepa*, 512 U.S. at 972. "For it is only when the jury is given a 'vehicle for expressing its "reasoned moral response" to . . . [mitigating and other case-specific] evidence in rendering its sentencing decision,' . . . [13] that we can be sure that the jury 'has treated the defendant as a "uniquely individual human being" and has made a reliable determination that death is the appropriate sentence.'"[14] *Penry v. Johnson*, 532 U.S. 782, 797 (2001).

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[13] The internal quotation is from *Penry v. Lynaugh*, 492 U.S. 302, 328 (1989) (*Penry I*).

[14] The internal quotation is from *Penry I*, 492 U.S. at 319, quoting *Woodson*, 428 U.S. at 305.

In short, it is wrong to read this Court's precedents as holding "that the mere mention of 'mitigating circumstances' to a capital sentencing jury satisfies the Eighth Amendment. Nor . . . [do those precedents] stand for the proposition that it is constitutionally sufficient to inform the jury that it may 'consider' mitigating circumstances in deciding the appropriate sentence." *Id.* To the contrary, the Court has repeatedly "held that 'it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence.'" *Tennard v. Dretke*, 542 U.S. 274, ___, 124 S. Ct. 2562, 2566 (2004). This is so because "[t]he sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant," to determine the "appropriate punishment to be imposed on an individual." *Spaziano*, 468 U.S. at 460.

When the sentencer is a jury, "[t]he capital sentencing decision requires the individual jurors to focus their collective judgment on the unique characteristics of a particular criminal defendant." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987). The insistence on "collective judgment" reflects the idea that "a capital sentencing jury representative of a criminal defendant's community assures a '"diffused impartiality,"' *Taylor v. Louisiana*, 419 U.S. 522, 530 . . . (1975) . . . , in the jury's task of 'express[ing] the conscience of the community on the ultimate question of life or death,' *Witherspoon v. Illinois*, 391 U.S. 510, 519 . . . (1968)." *McCleskey v. Kemp*, 481 U.S. at 310. It also reflects the more basic "recognition that 'the inestimable privilege of trial by jury . . . is a vital principle, underlying the whole administration of criminal justice,' *Ex parte Milligan*, 4 Wall. 2, 123 . . . (1866). See *Duncan v.*

*Louisiana*, 391 U.S. 145, 155 . . . (1968)." *McCleskey v. Kemp*, 481 U.S. at 309-310. In capital sentencing proceedings as in other jury trials, this vital principle includes the idea that jurors must reason together and reach a communal decision reflecting their unanimous agreement on the facts and values at issue. The Court has "long been of the view that '[t]he very object of the jury system is to secure unanimity by a comparison of views, and by arguments among the jurors themselves.' *Allen v. United States*, 164 U.S. 492 . . . (1896)." *Jones v. United States*, 527 U.S. 373, 382 (1999).

Thus, the Eighth Amendment requirement which a State must meet at the selection stage of a capital sentencing trial by a jury is not – as the State of Kansas and its *amici* would have it – simply that the State's procedures must allow the jurors to consider evidence in mitigation. Rather, the State's procedures must assure that the jurors will reach a reliable,[15] responsible,[16] "collective judgment on the unique characteristics of a particular criminal defendant"[17] and decide "whether the death sentence is the appropriate sanction,"[18] after deliberating together about the defendant's unique characteristics (including those

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[15] See, *e.g.*, *Woodson*, 428 U.S. at 305; *Gardner v. Florida*, 430 U.S. 349 (1977).

[16] See *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

[17] *McCleskey v. Kemp*, 481 U.S. at 311.

[18] *Sumner*, 483 U.S. at 78; and see *Graham v. Collins*, 506 U.S. 461, 468 (1993) ("States must confer on the sentencer sufficient discretion to take account of the 'character and record of the individual offender and the circumstances of the particular offense' to ensure that 'death is the appropriate punishment in a specific case'" [quoting *Woodson*, 428 U.S. at 305]).

proved in mitigation)[19] and the specific facts of the crime of which s/he stands convicted.[20]

### B. The Equipoise Provision of the Kansas Capital-Sentencing Procedure Fails to Meet This Requirement.

The purpose of the Eighth Amendment rules just described is to assure that capital sentencers will make a reliable individualized sentencing decision. In derogation of those rules, the Kansas statutory provision which the Kansas Supreme Court held unconstitutional (in *Kleypas*) relieves sentencing juries from the need to make such a decision and allows death sentences to be imposed when the jurors are unable to reach any collective judgment about the defendant's individual culpability that would single him or her out from the whole class of death-eligible defendants. Indeed, this Kansas provision encourages prosecutors to prevail on juries to impose death sentences without coming to agreement about the degree of the defendant's individual culpability or whether it warrants the punishment of death.

Kansas has chosen to adopt a two-stage process like that described in *Tuilaepa*. Under the capital-sentencing formula set forth in § 21-4624(e), the jury is instructed that it must first find the existence of at least one aggravating circumstance. If one or more aggravating circumstances are found, the jury must then weigh the

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[19] See, *e.g.*, *Lockett*, 438 U.S. at 604; *Eddings v. Oklahoma*, 455 U.S. 104, 109-114 (1982).

[20] See, *e.g.*, *Zant v. Stephens*, 462 U.S. at 879; *Tuilaepa*, 512 U.S. at 972; *Romano v. Oklahoma*, 512 U.S. 1, 7 (1994).

aggravating circumstances against any mitigating circumstances in making the decision between life and death. At this point, however, the jury is further instructed that it "shall" impose death if it finds beyond a reasonable doubt that the aggravating circumstances are "not outweighed by" the mitigating circumstances. As authoritatively construed by the Kansas Supreme Court, this means that the jury is required to return a death sentence even when jurors are in equipoise regarding the balance of aggravating and mitigating circumstances.

The upshot is that a Kansas capital sentencing jury is effectively marched all the way up the hill to the verge of the ultimate decision required by this Court's Eighth Amendment precedents, and is then permitted to march back down and impose a death sentence without ever having made that decision. Although the jury has rendered no judgment regarding the relative weights of the mitigating circumstances favoring a life sentence and the aggravating circumstances favoring death, it must impose death. If the jurors are in equipoise – a posture which means they are unable to reach any conclusions about the defendant "as [a] uniquely individual human being[ ]" that would distinguish him or her from any of the other "members of a faceless, undifferentiated mass" of death-eligible defendants (*Woodson*, 428 U.S. at 304) – they are told that they must "subject[ ] [him or her] to the blind infliction of the penalty of death," *id.*, without persevering in efforts to reach a consensus as to whether the particular facts of his or her case *are* distinguishably deserving of death. Thus, § 21-4624(e) cuts off the final collective decision that assures a reliable sentencing determination at the selection stage: whether, taking account of the "relevant facets of the character and record of the individual offender or

the circumstances of the particular offense," death is an appropriate punishment in a specific case. *Woodson*, 428 U.S. at 304.[21]

A Kansas jury may have before it all the information regarding individual characteristics and circumstances that the defendant has proffered as a basis for a life sentence. But if the jurors cannot say whether the mitigating circumstances shown by that evidence are or are not greater than the aggravating circumstances, Kansas' equipoise formula obliges the jury to impose a sentence of death. This is a death sentence rendered without the jury's having made a collective *decision* that the individual circumstances of the defendant's case mark it as more deserving of death than any other generic death-eligible conviction.

Undoubtedly, the jury has decided that the defendant is within the pool of cases which require "individualized sentencing determinations," *Stringer v. Black*, 503 U.S. at 230, because they all meet the minimum standards for death-eligibility. But a Kansas jury needs decide no more than that – it does not need to *make* the "individualized sentencing determination[]" which is constitutionally required – in order to sentence the defendant to die. *Equipoise* says only "we can't tell enough about the defendant's individual characteristics and circumstances to make that judgment." A death sentence returned under § 21-4624(e) by a jury in equipoise therefore expresses nothing about an individual defendant's "personal responsibility and moral

[21] It was precisely this aspect of the capital-sentencing decision that the Kansas Supreme Court focused on when it declared the statutory equipoise formula in § 21-4624(e) unconstitutional in *Kleypas*. See Pet. App. at 109a-115a.

guilt" (*Enmund*, 458 U.S. at 801) *except that s/he is somewhere within the class of death-eligible murder convicts.* The State argues that Kansas' equipoise formula assures that "similar results will be obtained under similar circumstances." Pet. Br. at 31. But as this Court's Eighth Amendment decisions teach, "a consistency produced by ignoring individual differences is a false consistency." *Eddings*, 455 U.S. at 104.

The Kansas equipoise provision not only works to absolve the jury from making an individualized assessment of the defendant's personal culpability in determining whether death is an appropriate punishment, but also invites the jury to relinquish its responsibility for making that determination. Under the equipoise formula, prosecutors can and do urge jurors that it is legally obligatory for them to return a death verdict if they cannot decide whether aggravation outweighs mitigation or *vice versa*. In the *Kleypas* case, for example, during closing argument at the penalty trial, the prosecutor emphasized to the jury that it must impose death even if the aggravating and mitigating circumstances were equally balanced. J.A. at 61 (*Kleypas* briefing). In Mr. Marsh's penalty trial, the prosecutor told the jury in closing argument that it could not consider mitigating circumstances unless they outweighed the aggravating circumstances "because the law has told you, and the Judge has told you that the law says that if the aggravating circumstances are not outweighed by mitigating circumstances, you shall return a verdict of death." Record, Vol. 54 at 54-55. The Kansas Supreme Court has reviewed prosecutorial-argument transcripts of this sort; its decision (in the *Kleypas* case) invalidating Kansas' equipoise provision reflects its local knowledge of Kansas prosecutors and Kansas juries; it knows how the

provision has played and is likely to play in Kansas trials. Its application of an unexceptionable federal constitutional principle – the Eighth Amendment command of responsible individualized capital sentencing determination – to these Kansas conditions is entitled to respect. See *Reitman v. Mulkey*, 387 U.S. 369, 373-376 (1967).

And that application accords with the realities of capital trials. In capital-sentencing proceedings, "the jury . . . must make the difficult, individualized judgment as to whether the defendant deserves the sentence of death." *Turner v. Murray*, 476 U.S. 28, 34 (1986) (plurality opinion). Because that judgment is a difficult one, jurors are all too likely to seize upon the legal comfort offered by an equipoise instruction from the court and by the prosecutor's equipoise argument telling them that they need not persevere in deliberating until all of them come to agreement on the excruciating, controversial decision whether aggravation or mitigation is the weightier in a closely balanced case. This kind of instruction and argument assuring jurors that they will have done their job if they return a death verdict after concluding only that the decision is too close and hard to call have the inescapable effect of relieving the jury of the need to reach collective judgment on the issue that the Eighth Amendment makes central to the capital-sentencing decision: whether death is the appropriate punishment on the unique, individual facts of the particular defendant's case. They thus create an unacceptable "risk that the death penalty will be

imposed in spite of factors which may call for a less severe penalty." *Lockett*, 438 U.S. at 605.[22]

The State and its *amici* offer several defenses of the Kansas equipoise provision:

First, the State distorts Kansas law by asserting that, under § 21-4624(e) and the jury instruction based on the statute, "the State must carry the burden of convincing the sentencer, beyond a reasonable doubt, that the aggravators are not outweighed by the mitigators *and that a sentence of death is appropriate*." Pet. Br. at 17 (citing J.A. at 26, Instr. No. 5) (emphasis added). Neither the Kansas statute nor the jury instruction calls for any final step requiring the jury to determine, after weighing aggravating and mitigating circumstances, whether death is an appropriate sentence. Not only is a jury in Kansas never asked to make that determination, but when the jury is compelled by law to return a death sentence in a situation of equipoise, the jury *cannot* make a determination whether death is an appropriate sentence for the individual offender.

Second, the State and its *amici* argue that it will be rare for a capital jury to find itself in equipoise. Pet. Br. at 33; Brief of the States of Arizona *et al.* at 20 n. 4; Brief of Criminal Justice Legal Foundation at 19. In *McKoy v. North Carolina*, 494 U.S. 433 (1990), both the majority opinion and the concurring opinion of Justice Kennedy found the North Carolina capital-sentencing procedure problematic because of the arbitrary results it would

[22] This Court understands full well that equipoise is no basis for making a responsible, reliable decision. See *O'Neal v. McAninch*, 513 U.S. 432, 440, 442 (1995).

produce in certain situations that a deliberating capital jury might encounter. *Id.* at 439-440, 453-454. Those situations were no more likely than that a Kansas jury will find itself in equipoise regarding the balance of aggravating and mitigating circumstances.[23] Yet the North Carolina statute was invalidated because of the *risk* of unconstitutional results. Such *risks*, though not large numerically, have always been regarded as intolerable in capital cases. See, *e.g.*, *Andres v. United States*, 333 U.S. 740, 752 (1948); *Lockett v. Ohio*, 438 U.S. 586, 605 (1978) (plurality opinion of Chief Justice Burger); *Beck v. Alabama*, 447 U.S. 625, 637-643 (1980); *Eddings v. Oklahoma*, 455 U.S. 104, 119 (concurring opinion of Justice O'Connor). We cannot ever know whether any particular death sentence imposed under the Kansas equipoise formula actually resulted from a situation of equipoise. But we also cannot know that a particular Kansas jury did *not* decree death by equipoise. One thing is clear: no one can say for sure that an individual defendant who receives a death

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[23] The reasoning of the State and its *amici* here seems to be: (1) in a world in which the equipoise instruction was not given, it is intuitively plausible that the situation of equipoise will be rare; (2) the equipoise instruction will affect the result only in cases in which the situation of equipoise would occur in that world; so, (3) the equipoise instruction will affect very few cases. This oddly purblind logic assumes that the giving of the instruction will not increase the number of cases in which equipoise occurs. And *that* assumption is *not* intuitively plausible – indeed, it is unworldly – inasmuch as the equipoise instruction affords juries an easy out from the difficult, stressful, contentious work of reconciling divergent views and reaching a yes-or-no decision in close cases. The quantitative logic of the State and its *amici* also ignores that qualitatively the cases most at risk are not "the most extreme of crimes," *Gregg*, 428 U.S. at 187 – but those in which aggravation and mitigation are most evenly balanced.

sentence under the Kansas formula was actually found by the jury to deserve that punishment.

Finally, the State and its *amici* argue that the Kansas equipoise formula satisfies the individualization requirement because it does not restrict the admission of relevant mitigating evidence and, under this Court's precedents (*e.g.*, *Boyde v. California*, 494 U.S. 370, 377 (1990); *Blystone v. Pennsylvania*, 494 U.S. 299 (1990); *Johnson v. Texas*, 509 U.S. 350, 353-355 (1993)), the States are free to structure as they will the way in which a capital sentencing jury considers mitigating circumstances. See Pet. Br. at 23; Brief of the States of Arizona *et al.* at 18; Brief of Criminal Justice Legal Foundation at 14-15. But this case is not about *structuring* decisionmaking; it is about *terminating* decisionmaking. The equipoise provision at issue here does not regulate *how* a Kansas jury is to consider mitigating evidence (see *Johnson*, 509 U.S. at 372-373[24]); rather, it tells the jurors that if they find themselves in equipoise *after they have finished considering* aggravating and mitigating evidence in the manner structured by state law, *they must impose a death sentence without making the ultimate collective sentencing judgment required by this Court's Eighth Amendment jurisprudence* – whether or not death is an appropriate punishment for this individual defendant who committed this specific crime.

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[24] There "'is a simple and logical difference between rules that govern what factors the jury must be permitted to consider in making its sentencing decision and rules that govern how the State may guide the jury in considering and weighing those factors in reaching a decision.'" The internal quotation is from *Saffle v. Parks*, 494 U.S. 484, 490 (1990).

### C. The State's Contention that *Walton v. Arizona* Speaks to the Issue Now before the Court is Ill-Founded.

The State claims that the equipoise issue is controlled by this Court's decision in *Walton v. Arizona*, 497 U.S. 639 (1990). See Pet. Br. at 14. In *State v. Kleypas* – the case in which the parties joined issue on the federal constitutionality of § 21-4624(e) – the Kansas Supreme Court engaged in a detailed comparison of the Kansas statutory language with the Arizona statute at issue in *Walton*, both as written and as analyzed by this Court. It found the two statutes distinguishable because, unlike the Kansas statute, the Arizona statute did not mandate a death sentence when the jury finds itself in equipoise between the mitigating and aggravating circumstances. Pet. App. at 102a-103a (*Kleypas* opinion).

*Walton* involved the Arizona statutory capital-sentencing formula, which mandates a sentence of death "if the court finds one or more of the aggravating circumstances enumerated . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." 497 U.S. at 644 (quoting ARIZ. REV. STAT. ANN. § 13-703(E) (1989)). This Court held in *Walton* that its decisions in *Boyde* and *Blystone* precluded Walton's claim that the Arizona statute created an unconstitutional presumption of death. *Walton*, 497 U.S. at 651-652.

The State concedes that the term "equipoise" appears nowhere in the plurality opinion of the Court in *Walton*. Pet. Br. at 18. There is good reason for the omission. The statutes at issue in both *Boyde* and *Blystone* required the jury to impose death only when aggravating circumstances outweighed mitigating circumstances; they did not involve an equipoise issue. See *Boyde*, 494 U.S. at 374 (the jury

was instructed in accordance with the California death penalty statute that it "shall impose" a death sentence if it concludes that the aggravating circumstances outweigh the mitigating circumstances); *Blystone*, 494 U.S. at 302 (involving a Pennsylvania statute mandating death if the jury finds that aggravating circumstances outweigh mitigating circumstances).[25] In *Walton* itself, the Arizona statute was interpreted both by the Arizona Supreme Court and by the State of Arizona before this Court as mandating a death sentence only when aggravating circumstances outweighed mitigating circumstances. See *State v. Walton*, 769 P.2d 1017, 1030 (Ariz. 1989) (holding "our statute provides constitutionally acceptable standards

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[25] In *Walton*, this Court granted *certiorari* to resolve a conflict between the Arizona Supreme Court's decision there and the Ninth Circuit's decision in *Adamson v. Ricketts*, 865 F.2d 1011 (9th Cir. 1988). *Adamson* interpreted the Arizona statute as removing the judge's discretion by requiring a death sentence "if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which *outweigh* the aggravating circumstances." *Id.* at 1042. In concluding that the Arizona statute created an unconstitutional presumption of death, the Ninth Circuit stated that "[t]his is because in situations where the mitigating and aggravating circumstances are in balance, or where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death." *Id.* at 1043.

While the Ninth Circuit's phrase "in balance" may have alluded to a situation of equipoise, such an interpretation contradicted Arizona law. The Ninth Circuit in *Adamson* did not elaborate on the point, and the remainder of the sentence, quoted above, suggests that the court was more concerned with the mandatory nature of the sentencing formula than with the relative balance of aggravating and mitigating circumstances. Both *Adamson* and the Arizona Supreme Court's decision in *Walton* were handed down before this Court's decisions in *Boyde* and *Blystone*. In reviewing *Walton* after those cases, there is no reason to believe this Court focused on *Adamson*'s description of the Arizona statute.

for deciding whether aggravating circumstances outweigh mitigating factors"); Respondent's Brief on the Merits, *Walton v. Arizona*, at 28-33.[26] In fact, at the selection stage, the Arizona statute at issue in *Walton* does not mandate a death sentence if the sentencer finds that aggravating and mitigating circumstances are in equipoise. It mandates a death sentence only if the court finds "no mitigating circumstances sufficiently substantial to call for leniency." Unlike the Kansas equipoise provision, the Arizona statute performs the requisite function of individualized sentencing at the selection stage, because the "sufficiently substantial to call for leniency" language instructs the sentencer to spare the defendant's life if it finds enough reason to do so in the facts of the case, regardless of the relative weight of the aggravating and mitigating circumstances. See *State v. Trostle*, 951 P.2d 869, 888 (Ariz. 1997); *State v. Valencia*, 645 P.2d 239, 241 (Ariz. 1982). Under Arizona law, the determination of what is or is not "sufficiently substantial" is left to the sentencer's discretion, allowing the sentencer to make a considered determination – based on the unique circumstances of the individual defendant – whether death is an appropriate punishment in a specific case. Moreover, Arizona law

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[26] While the Arizona Supreme Court has at times spoken of the "sufficiently substantial to call for leniency" language in terms of mitigating circumstances outweighing aggravating circumstances, see, *e.g.*, *State v. Gretzler*, 659 P.2d 1, 13 (Ariz. 1983) (citing examples of prior cases where mitigating circumstances "did not outweigh", "did not excuse", "were not sufficiently substantial to outweigh", or "were found insufficiently substantial to outweigh" aggravating circumstances), no Arizona court has ever interpreted the Arizona statute to require a death sentence when aggravating and mitigating circumstances are in equipoise. In *Gretzler* itself, the court analyzed the Arizona statute as requiring a death sentence "[w]here one or more statutory aggravating circumstances is found, and no mitigation exists." *Id.*

explicitly requires that any doubt about whether a death sentence should be imposed is to be resolved in favor of a life sentence. *Trostle*, 951 P.2d at 888; *State v. Marlow*, 786 P.2d 395, 402 (Ariz. 1989); *State v. Rockwell*, 775 P.2d 1069, 1080 (Ariz. 1989); *Valencia*, 645 P.2d at 241.

### D. The Kansas Statutory Provision at Issue Here Is Unique; A Holding that It Is Unconstitutional Threatens No Other State's Capital-Sentencing Laws; To the Contrary, Courts in Other States Have Uniformly Avoided Giving Their Statutes Effects Like Those that the State of Kansas and its *Amici* Are Asking this Court to Approve.

Kansas is unique among death penalty States in mandating a death sentence when aggravating and mitigating circumstances are in equipoise. The State of Montana, for example, has a statutory death-sentencing formula identical to Arizona's. See MONT. CODE ANN. § 46-18-305 (2003) (requiring a death sentence if the court "finds one or more of the aggravating circumstances and finds that there are no mitigating circumstances sufficiently substantial to call for leniency"). The Montana Supreme Court, in a post-*Walton* case, squarely considered an issue of equipoise under the "sufficiently substantial to call for leniency" language and held that the formula "does not require the death sentence to be imposed if the aggravating and mitigating factors are of equal weight." *State v. Smith*, 863 P.2d 1000, 1012 (Mont. 1993).[27]

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[27] The *Smith* case was cited by the Kansas Supreme Court in *Kleypas*, in finding that Kansas' statutory language was materially different than that of the Arizona statute in *Walton*. Pet. App. at 104a.

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In Colorado, a death-sentencing formula like Kansas' – one mandating death when aggravating and mitigating circumstances are in equipoise – was invalidated on state constitutional grounds in *People v. Young*, 814 P.2d 834, 839 (Colo. 1991).[28] The statutory formula at issue in *Young* had eliminated an additional step, contained in the previous version of the same statute, which required the jury, if it found that "any mitigating factors do not outweigh the proven statutory aggravating factors", to go on and decide "whether the defendant should be sentenced to death or to life imprisonment." *Id.* at 840. Following the *Young* decision, the Colorado legislature restored the final step to the death-sentencing formula, requiring the sentencer to determine, after weighing aggravating and mitigating circumstances, "whether the defendant should be sentenced to death or life imprisonment." See COLO. REV. STAT. § 18-1.3-1201(2)(c) (2004).

In fact, every court that has considered a statutory provision mandating death in a situation of equipoise has invalidated the formula or found a ground for refusing to apply it. See *Hulsey v. Sargent*, 868 F.Supp. 1090, 1103 (E.D. Ark. 1993) (finding an Arkansas statute unconstitutional; "the Eighth and Fourteenth Amendments with their requirements of individualized sentencing and full consideration of evidence in mitigation appear to require

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The holding on the equipoise issue in *Smith* was reaffirmed on appeal after remand. *State v. Smith*, 931 P.2d 1272, 1278 (Mont. 1996), *cert. denied*, 522 U.S. 965 (1997).

[28] As the Kansas Supreme Court pointed out in *Kleypas*, the Montana Supreme Court in the *Smith* case, note 27 *supra*, declined to apply the Colorado Supreme Court's reasoning in *Young* because the Montana statute, unlike Colorado's, did not require a death sentence in a situation of equipoise. Pet. App. at 104a-105a.

relief"); *People v. Young*, *supra*, 814 P.2d at 845; *State v. Biegenwald*, 106 N.J. 13, 62, 65, 524 A.2d 130, 156, 157 (N.J. 1987) (saying that "[i]n no proceeding is it more imperative to be assured that the outcome is fair than in these cases"; finding it "difficult to believe that the Legislature thought it fundamentally fair that a defendant be executed *except* where the mitigating factors *outweigh* the aggravating"; concluding that "the concept of executing . . . [the defendant] where the explanations for his misconduct (the mitigating factors) were equally as significant as the culpable aspects of that misconduct (the aggravating factors) is foreign to what the Legislature would certainly intend"; and invoking considerations of "fundamental fairness" to conform New Jersey's 1982 statute, which in terms required death when aggravating and mitigating circumstances were in equipoise, to the provisions of a 1985 amendment requiring that aggravating factors must outweigh any mitigating factors in order for a death sentence to be imposed). Arkansas, like Colorado and New Jersey, has now amended its capital sentencing statute to eliminate the unconstitutional equipoise provision. *See* ARK. STAT. ANN. § 5-4-603(a) (2005) (in order to impose a death sentence, the jury must find that "aggravating circumstances outweigh beyond a reasonable doubt mitigating circumstances found to exist").[29]

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[29] Alabama and Tennessee also require a finding that aggravating circumstances outweigh mitigating circumstances in order to support a death sentence. ALA. CODE 1975 § 13A-5-46 (2005); TENN. CODE ANN. § 39-13-204(g)(1) (2005). Tennessee, along with Colorado, Arkansas and New Jersey, has abandoned an earlier formula containing a mandatory death-by-equipoise provision. See *Bell v. Cone*, 535 U.S. 685, 690-691 (2002) (citing the "then-applicable Tennessee law . . . [under which] a death sentence was required if the jury found unanimously that the State proved beyond a reasonable doubt the existence of at least one

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As the *Hulsey* court pointed out in striking down the mandatory death-by-equipoise provision in Arkansas, there is a critical difference between a provision mandating a death sentence when aggravating and mitigating circumstances are equally balanced, and one that contains a similarly-worded formula but also includes a provision akin to Colorado's, calling upon the jury in the final analysis to make an individualized determination whether to impose life imprisonment or death. *Hulsey*, 868 F.Supp. at 1102 (citing *Smith v. Armontrout*, 888 F.2d 530 (8th Cir. 1989)).[30] Thus, in statutes constructed along the general lines of Kansas', the commonplace inclusion of a Colorado-type provision or its

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statutory aggravating circumstance that was not outweighed by any mitigating circumstance").

Statutes in Washington and Illinois, employing language substantially similar to that in the Arizona statute, have been interpreted as creating a "presumption of leniency." See *Campbell v. Kincheloe*, 829 F.2d 1453, 1465-1466 (9th Cir. 1987); *Campbell v. Wood*, 18 F.3d 662, 674-675 (9th Cir. 1994). In *Silagy v. Peters*, 905 F.2d 986, 1000 (7th Cir. 1990), the Illinois statute, requiring death if mitigation is not "sufficient to preclude" the death penalty, was interpreted as allowing the imposition of a death sentence only after the sentencer determines that the aggravating circumstances outweigh the mitigating circumstances.

Similarly, in *State v. Sivak*, 901 P.2d 494, 499 (Idaho 1995), the Idaho Supreme Court held that, under the then-existing Idaho statute, the trial court had "complied with the statutory requirement of finding the existence of one statutory aggravating factor that outweighs all of the mitigating evidence."

[30] In *Armontrout*, the Eighth Circuit found no constitutional error in a Missouri jury instruction that required jurors to determine whether sufficient mitigating circumstances existed that outweighed aggravating circumstances. The court concluded that the instruction described findings which would compel a life sentence but did not say that death must be the verdict if those findings were not made. Rather, the instruction told "the jury it does not have to return a verdict of death, whatever it thinks about the existence or weight of aggravating or mitigating circumstances." 888 F.2d at 545.

equivalent obviates the federal constitutional problem posed by the Kansas equipoise formula. See, *e.g.*, COLO. REV. STAT. § 18-1.3-1201(2) (2004); FLA. STAT. § 921.141(2) (2005); MISS. CODE ANN. § 99-19-101(2)(c), (3)(c) (2005); NEV. REV. STAT. § 175.554(2) (2004); N.C. GEN. STAT. § 15A-2000(b) (2004).

Only Kansas still decrees death by equipoise. Such a procedure is sharply at odds with the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion). But this is not because – as the straw-man argument the State attributes to the Kansas Supreme Court supposedly runs – "'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required.'" Pet. Br. at 21, quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179 (1988). It is because the Eighth Amendment requires a State to provide *some* procedure which assures that a sentencing jury will make a reliable, collective judgment that death is the appropriate punishment for the particular defendant who committed the specific crime in the individual case at bar; and this requirement is not met when jurors are told to return a death verdict if they are in equipoise regarding the balance of aggravating and mitigating circumstances – a situation which means, by definition, that the jury has been unable to reach any affirmative conclusions about the defendant "as [a] uniquely individual human being[]" which would single him or her out from the "faceless, undifferentiated mass" of death-eligible defendants. *Woodson*, 428 U.S. at 304. Consequently, a verdict of death returned under § 21-4624(e) fails to perform the constitutionally necessary function of deciding, at the ultimate selection stage of the capital sentencing process, whether

an individual defendant eligible for the death penalty actually deserves that punishment. *Tuilaepa*, 512 U.S. at 972.

## CONCLUSION

The State's petition for *certiorari* should be dismissed for lack of jurisdiction. If the Court concludes it has jurisdiction, the decision below should be affirmed.

Respectfully submitted,

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October 2005

## Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

## Syllabus

## KANSAS *v.* MARSH

### CERTIORARI TO THE SUPREME COURT OF KANSAS

No. 04–1170. Argued December 7, 2005—Reargued April 25, 2006—Decided June 26, 2006

Finding three aggravating circumstances that were not outweighed by mitigating circumstances, a Kansas jury convicted respondent Marsh of, *inter alia*, capital murder and sentenced him to death. Marsh claimed on direct appeal that Kan. Stat. Ann. §21–4624(e) establishes an unconstitutional presumption in favor of death by directing imposition of the death penalty when aggravating and mitigating circumstances are in equipoise. Agreeing, the Kansas Supreme Court concluded that §21–4624(e)'s weighing equation violated the Eighth and Fourteenth Amendments and remanded for a new trial.

*Held:*

1. This Court has jurisdiction to review the Kansas Supreme Court's judgment under 28 U. S. C. §1257. That provision authorizes review of a State's final judgment when a state statute's validity is questioned on federal constitutional grounds, and it permits review even when the state-court proceedings are not complete where the federal claim has been finally decided and later review of the federal issue cannot be had, whatever the case's outcome. *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469, 481. Although Marsh will be retried, the State Supreme Court's determination that the death penalty statute is unconstitutional is final and binding on the lower state courts. Thus, the State will be unable to obtain further review of its law in this case. This Court has deemed lower court decisions final for §1257 purposes in like circumstances, see, *e.g.*, *Florida* v. *Meyers*, 466 U. S. 380 *(per curiam)*. Pp. 3–4.

2. The State Supreme Court's judgment is not supported by adequate and independent state grounds. Marsh maintains that the judgment was based on state law, the State Supreme Court having previously reviewed the statute in *State* v. *Kleypas*. However, *Kley-*

Syllabus

*pas* itself rested on federal law. In this case, the State Supreme Court chastised the *Kleypas* court for avoiding the constitutional issue, squarely found §21–4624(e) unconstitutional on its face, and overruled *Kleypas* in relevant part. Pp. 4–5.

3. Kansas' capital sentencing statute is constitutional. Pp. 5–19.

(a) *Walton* v. *Arizona*, 497 U. S. 639, requires approval of the Kansas statute. There, the Court held that a state death penalty statute may give the defendant the burden to prove that mitigating circumstances outweigh aggravating circumstances. *A fortiori*, Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the two are in equipoise. Pp. 5–9.

(b) Even if, as Marsh contends, *Walton* does not directly control here, general principles in this Court's death penalty jurisprudence lead to the same conclusion. So long as a state system satisfies the requirements of *Furman* v. *Georgia*, 408 U. S. 238, and *Gregg* v. *Georgia*, 428 U. S. 153—that a system must rationally narrow the class of death-eligible defendants and must permit a jury to render a reasonable, individualized sentencing determination—a State has a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are weighed. The use of mitigation evidence is a product of the individual-sentencing requirement. Defendants have the right to present sentencers with information relevant to the sentencing decision and sentencers are obliged to consider that information in determining the appropriate sentence. The thrust of this Court's mitigation jurisprudence ends here, for the Court has never held that the Constitution requires a specific method for balancing aggravating and mitigating factors. Pp. 9–11.

(c) Kansas' death penalty statute satisfies the constitutional mandates of *Furman* and its progeny because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. The State's weighing equation merely channels a jury's discretion by providing criteria by which the jury may determine whether life or death is appropriate. Its system provides the kind of guided discretion sanctioned in, *e.g.*, *Walton*, *supra*. Contrary to Marsh's argument, §21–4624(e) does not create a general presumption in favor of the death penalty. A life sentence must be imposed if the State fails to demonstrate the existence of an aggravating circumstance beyond a reasonable doubt, if the State cannot prove beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances, or if the jury is unable to reach a unanimous deci-

Syllabus

sion in any respect. Marsh's contentions that an equipoise determination reflects juror confusion or inability to decide between life and death or that the jury may use equipoise as a loophole to shirk its constitutional duty to render a reasoned, moral sentencing decision rest on an implausible characterization of the Kansas statute—that a jury's determination that aggravators and mitigators are in equipoise is not a *decision*, much less a decision *for death*. Weighing is not an end, but a means to reaching a decision. Kansas' instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for death. Pp. 11–16.

278 Kan. 520, 102 P. 3d 445, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, and ALITO, JJ., joined. SCALIA, J., filed a concurring opinion. STEVENS, J., filed a dissenting opinion. SOUTER, J., filed a dissenting opinion, in which STEVENS, GINSBURG, and BREYER, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 04–1170

KANSAS, PETITIONER *v.* MICHAEL LEE MARSH, II

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 2006]

JUSTICE THOMAS delivered the opinion of the Court.

Kansas law provides that if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed. Kan. Stat. Ann. §21–4624(e) (1995). We must decide whether this statute, which requires the imposition of the death penalty when the sentencing jury determines that aggravating evidence and mitigating evidence are in equipoise, violates the Constitution. We hold that it does not.

I

Respondent Michael Lee Marsh II broke into the home of Marry Ane Pusch and lay in wait for her to return. When Marry Ane entered her home with her 19-month-old daughter, M. P., Marsh repeatedly shot Marry Ane, stabbed her, and slashed her throat. The home was set on fire with the toddler inside, and M. P. burned to death.

The jury convicted Marsh of the capital murder of M. P., the first-degree premeditated murder of Marry Ane, aggravated arson, and aggravated burglary. The jury found beyond a reasonable doubt the existence of three aggravating circumstances, and that those circumstances were not outweighed by any mitigating circumstances. On the

basis of those findings, the jury sentenced Marsh to death for the capital murder of M. P. The jury also sentenced Marsh to life imprisonment without possibility of parole for 40 years for the first-degree murder of Marry Ane, and consecutive sentences of 51 months' imprisonment for aggravated arson and 34 months' imprisonment for aggravated burglary.

On direct appeal, Marsh challenged §21–4624(e), which reads:

> "If, by unanimous vote, the jury finds beyond a reasonable doubt that one or more of the aggravating circumstances enumerated in K. S. A. 21–4625 . . . exist and, further, that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist, the defendant shall be sentenced to death; otherwise the defendant shall be sentenced as provided by law."

Focusing on the phrase "shall be sentenced to death," Marsh argued that §21–4624(e) establishes an unconstitutional presumption in favor of death because it directs imposition of the death penalty when aggravating and mitigating circumstances are in equipoise.

The Kansas Supreme Court agreed, and held that the Kansas death penalty statute, §21–4624(e), is facially unconstitutional. 278 Kan. 520, 534–535, 102 P. 3d 445, 458 (2004). The court concluded that the statute's weighing equation violated the Eighth and Fourteenth Amendments of the United States Constitution because, "[i]n the event of equipoise, *i.e.*, the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal, the death penalty would be required." *Id.*, at 534, 102 P. 3d, at 457. The Kansas Supreme Court affirmed Marsh's conviction and sentence for aggravated burglary and premeditated murder of Marry Ane, and reversed and remanded for new

trial Marsh's convictions for capital murder of M. P. and aggravated arson.[1] We granted certiorari, 544 U. S. 1060 (2005), and now reverse the Kansas Supreme Court's judgment that Kansas' capital sentencing statute, Kan. Stat. Ann. §21–4624(e), is facially unconstitutional.

II

In addition to granting certiorari to review the constitutionality of Kansas' capital sentencing statute, we also directed the parties to brief and argue: (1) whether we have jurisdiction to review the judgment of the Kansas Supreme Court under 28 U. S. C. §1257, as construed by *Cox Broadcasting Corp.* v. *Cohn*, 420 U. S. 469 (1975); and (2) whether the Kansas Supreme Court's judgment is supported by adequate state grounds independent of federal law. 544 U. S. 1060. Having considered the parties' arguments, we conclude that we have jurisdiction in this case and that the constitutional issue is properly before the Court.

A

Title 28 U. S. C. §1257 authorizes this Court to review, by writ of certiorari, the final judgment of the highest court of a State when the validity of a state statute is questioned on federal constitutional grounds. This Court has determined that the foregoing authorization permits review of the judgment of the highest court of a State, even though the state-court proceedings are not yet complete, "where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue

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[1]The Kansas Supreme Court found that the trial court committed reversible error by excluding circumstantial evidence of third-party guilt connecting Eric Pusch, Marry Ane's husband, to the crimes, and, accordingly ordered a new trial on this ground. 278 Kan., at 528–533, 102 P. 3d, at 454–457.

cannot be had, whatever the ultimate outcome of the case." *Cox Broadcasting, supra*, at 481.

Here, although Marsh will be retried on the capital murder and aggravated arson charges, the Kansas Supreme Court's determination that Kansas' death penalty statute is facially unconstitutional is final and binding on the lower state courts. Thus, the State will be unable to obtain further review of its death penalty law later in this case. If Marsh is acquitted of capital murder, double jeopardy and state law will preclude the State from appealing. If he is reconvicted, the State will be prohibited under the Kansas Supreme Court's decision from seeking the death penalty, and there would be no opportunity for the State to seek further review of that prohibition. Although Marsh argues that a provision of the Kansas criminal appeals statute, Kan. Stat. Ann. §22–3602(b) (2003 Cum. Supp.), would permit the State to appeal the invalidation of Kansas' death penalty statute, that contention is meritless. That statute provides for limited appeal in only four enumerated circumstances, none of which apply here. We have deemed lower court decisions final for 28 U. S. C. §1257 purposes in like circumstances, see *Florida* v. *Meyers*, 466 U. S. 380 (1984) *(per curiam)*; *South Dakota* v. *Neville*, 459 U. S. 553 (1983); *New York* v. *Quarles*, 467 U. S. 649 (1984), and do so again here.

B

Nor is the Kansas Supreme Court's decision supported by adequate and independent state grounds. Marsh maintains that the Kansas Supreme Court's decision was based on the severability of §21–4624(e) under state law, and not the constitutionality of that provision under federal law, the latter issue having been resolved by the Kansas Supreme Court in *State* v. *Kleypas*, 272 Kan. 894, 40 P. 3d 139 (2001). Marsh's argument fails.

*Kleypas*, itself, rested on federal law. See *id.*, at 899–

903, 40 P. 3d, at 166–167. In rendering its determination here, the Kansas Supreme Court observed that *Kleypas*, "held that the weighing equation in K. S. A. 21–4624(e) as written was unconstitutional under the Eighth and Fourteenth Amendments" as applied to cases in which aggravating evidence and mitigating evidence are equally balanced. 278 Kan., at 534, 102 P. 3d, at 457. In this case, the Kansas Supreme Court chastised the *Kleypas* court for avoiding the constitutional issue of the statute's facial validity, squarely held that §21–4624(e) is unconstitutional on its face, and overruled the portion of *Kleypas* upholding the statute through the constitutional avoidance doctrine and judicial revision. 278 Kan., at 534–535, 539–542, 102 P. 3d, at 458, 462. As in *Kleypas*, the Kansas Supreme Court clearly rested its decision here on the Eighth and Fourteenth Amendments to the United States Constitution. We, therefore, have jurisdiction to review its decision. See *Michigan* v. *Long*, 463 U. S. 1032, 1040–1041 (1983).

III

This case is controlled by *Walton* v. *Arizona*, 497 U. S. 639 (1990), overruled on other grounds, *Ring* v. *Arizona*, 536 U. S. 584 (2002). In that case, a jury had convicted Walton of a capital offense. At sentencing, the trial judge found the existence of two aggravating circumstances and that the mitigating circumstances did not call for leniency, and sentenced Walton to death. 497 U. S., at 645. The Arizona Supreme Court affirmed, and this Court granted certiorari to resolve the conflict between the Arizona Supreme Court's decision in *State* v. *Walton*, 159 Ariz. 571, 769 P. 2d 1017 (1989) (en banc) (holding the Arizona death penalty statute constitutional), and the Ninth Circuit's decision in *Adamson* v. *Ricketts*, 865 F. 2d 1011, 1043–1044 (1988) (en banc) (finding the Arizona death penalty statute unconstitutional because, "in situations

where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death"). See *Walton*, 497 U. S., at 647.

Consistent with the Ninth Circuit's conclusion in *Adamson*, Walton argued to this Court that the Arizona capital sentencing system created an unconstitutional presumption in favor of death because it "tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed, unless—as the Arizona Supreme Court put it in Petitioner's case—there are 'outweighing mitigating factors.'" Brief for Petitioner in *Walton* v. *Arizona*, O. T. 1989, No. 88–7351, p. 33; see also *id.*, at 34 (arguing that the statute is unconstitutional because the defendant "'must . . . bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance'" (alteration omitted)). Rejecting Walton's argument, see 497 U. S., at 650, 651, this Court stated:

> "So long as a State's method of allocating the burdens of proof does not lessen the State's burden to prove every element of the offense charged, or in this case to prove the existence of aggravating circumstances, a defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Id.*, at 650.

This Court noted that, as a requirement of individualized sentencing, a jury must have the opportunity to consider all evidence relevant to mitigation, and that a state statute that permits a jury to consider any mitigating evidence comports with that requirement. *Id.*, at 652 (citing *Blystone* v. *Pennsylvania*, 494 U. S. 299, 307 (1990)). The

Court also pointedly observed that while the Constitution requires that a sentencing jury have discretion, it does not mandate that discretion be unfettered; the States are free to determine the manner in which a jury may consider mitigating evidence. 497 U. S., at 652 (citing *Boyde* v. *California*, 494 U. S. 370, 374 (1990)). So long as the sentencer is not precluded from considering relevant mitigating evidence, a capital sentencing statute cannot be said to impermissibly, much less automatically, impose death. 497 U. S., at 652 (citing *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) (plurality opinion), and *Roberts* v. *Louisiana*, 428 U. S. 325 (1976) (plurality opinion)). Indeed, *Walton* suggested that the only capital sentencing systems that would be impermissibly mandatory were those that would "automatically impose death upon conviction for certain types of murder." 497 U. S., at 652.

Contrary to Marsh's contentions and the Kansas Supreme Court's conclusions, see 278 Kan., at 536–538, 102 P. 3d, at 459, the question presented in the instant case was squarely before this Court in *Walton*. Though, as Marsh notes, the *Walton* Court did not employ the term "equipoise," that issue undeniably gave rise to the question this Court sought to resolve, and it was necessarily included in Walton's argument that the Arizona system was unconstitutional because it required the death penalty unless the mitigating circumstances *outweighed* the aggravating circumstances. See *supra*, at 5. Moreover, the dissent in *Walton* reinforces what is evident from the opinion and the judgment of the Court—that the equipoise issue was before the Court, and that the Court resolved the issue in favor of the State. Indeed, the "equipoise" issue was, in large measure, the basis of the *Walton* dissent. See 497 U. S., at 687–688 (opinion of Blackmun, J.) ("If the mitigating and aggravating circumstances are in equipoise, the [Arizona] statute requires that the trial judge impose capital punishment. The assertion that a

sentence of death may be imposed in such a case runs directly counter to the Eighth Amendment requirement that a capital sentence must rest upon a 'determination that death is the appropriate punishment in a specific case'"). Thus, although *Walton* did not discuss the equipoise issue explicitly, that issue was resolved by its holding. Cf. *post*, at 2 (STEVENS, J., dissenting); cf. also *post*, at 2, n. 1 (SOUTER, J., dissenting).

Our conclusion that *Walton* controls here is reinforced by the fact that the Arizona and Kansas statutes are comparable in important respects. Similar to the express language of the Kansas statute, the Arizona statute at issue in *Walton* has been consistently construed to mean that the death penalty will be imposed upon a finding that aggravating circumstances are not outweighed by mitigating circumstances.[2] See *State* v. *Ysea*, 191 Ariz. 372, 375, 956 P. 2d 499, 502 (1998) (en banc); *State* v. *Gretzler*, 135 Ariz. 42, 55, 659 P. 2d 1, 14 (1983) (in banc); *Adamson*, 865 F. 2d, at 1041–1043. Like the Kansas statute, the Arizona statute places the burden of proving the existence of aggravating circumstances on the State, and both statutes require the defendant to proffer mitigating evidence.

The statutes are distinct in one respect. The Arizona statute, once the State has met its burden, tasks the defendant with the burden of proving sufficient mitigating circumstances to overcome the aggravating circumstances and that a sentence less than death is therefore warranted. In contrast, the Kansas statute requires the State

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[2] Ariz. Rev. Stat. Ann. §13–703(E) (Supp. 2005) provides:

"In determining whether to impose a sentence of death or life imprisonment, the trier of fact shall take into account the aggravating and mitigating circumstances that have been proven. The trier of fact shall impose a sentence of death if the trier of fact finds one or more of the aggravating circumstances enumerated in subsection F of this section and then determines that there are no mitigating circumstances sufficiently substantial to call for leniency."

to bear the burden of proving to the jury, beyond a reasonable doubt, that aggravators are not outweighed by mitigators and that a sentence of death is therefore appropriate; it places no additional evidentiary burden on the capital defendant. This distinction operates in favor of Kansas capital defendants. Otherwise the statutes function in substantially the same manner and are sufficiently analogous for our purposes. Thus, *Walton* is not distinguishable from the instant case.

Accordingly, the reasoning of *Walton* requires approval of the Kansas death penalty statute. At bottom, in *Walton*, the Court held that a state death penalty statute may place the burden on the defendant to prove that mitigating circumstances outweigh aggravating circumstances. *A fortiori*, Kansas' death penalty statute, consistent with the Constitution, may direct imposition of the death penalty when the State has proved beyond a reasonable doubt that mitigators do not outweigh aggravators, including where the aggravating circumstances and mitigating circumstances are in equipoise.

## IV

### A

Even if, as Marsh contends, *Walton* does not directly control, the general principles set forth in our death penalty jurisprudence would lead us to conclude that the Kansas capital sentencing system is constitutionally permissible. Together, our decisions in *Furman* v. *Georgia*, 408 U. S. 238 (1972) *(per curiam)*, and *Gregg* v. *Georgia*, 428 U. S. 153 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), establish that a state capital sentencing system must: (1) rationally narrow the class of death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime. See *id.*, at 189.

So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed. See *Franklin* v. *Lynaugh*, 487 U. S. 164, 179 (1988) (plurality opinion) (citing *Zant* v. *Stephens*, 462 U. S. 862, 875–876, n. 13 (1983)).

The use of mitigation evidence is a product of the requirement of individualized sentencing. See *Graham* v. *Collins*, 506 U. S. 461, 484–489 (1993) (THOMAS, J., concurring) (discussing the development of mitigation precedent). In *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978), a plurality of this Court held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." (Emphasis in original.) The Court has held that the sentencer must have full access to this "'highly relevant'" information. *Id.*, at 603 (alteration omitted) (quoting *Williams* v. *New York*, 337 U. S. 241, 247 (1949)). Thus, in *Lockett*, the Court struck down the Ohio death penalty statute as unconstitutional because, by limiting a jury's consideration of mitigation to three factors specified in the statute, it prevented sentencers in capital cases from giving independent weight to mitigating evidence militating in favor of a sentence other than death. 438 U. S., at 604–605. Following *Lockett*, in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982), a majority of the Court held that a sentencer may not categorically refuse to consider any relevant mitigating evidence. *Id.*, at 114; see also *Skipper* v. *South Carolina*, 476 U. S. 1, 3–4 (1986) (discussing *Eddings*).

In aggregate, our precedents confer upon defendants the right to present sentencers with information relevant to the sentencing decision and oblige sentencers to consider

that information in determining the appropriate sentence. The thrust of our mitigation jurisprudence ends here. "[W]e have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required." *Franklin, supra,* at 179 (citing *Zant, supra,* at 875–876, n. 13). Rather, this Court has held that the States enjoy "'a constitutionally permissible range of discretion in imposing the death penalty.'" *Blystone*, 494 U. S., at 308 (quoting *McCleskey* v. *Kemp,* 481 U. S. 279, 305–306 (1987)). See also 494 U. S., at 307 (stating that "[t]he requirement of individualized sentencing in capital cases is satisfied by allowing the jury to consider all relevant mitigating evidence"); *Graham, supra,* at 490 (THOMAS, J., concurring) (stating that "[o]ur early mitigating cases may thus be read as doing little more than safeguarding the adversary process in sentencing proceedings by conferring on the defendant an affirmative right to place his relevant evidence before the sentencer").

B

The Kansas death penalty statute satisfies the constitutional mandates of *Furman* and its progeny because it rationally narrows the class of death-eligible defendants and permits a jury to consider any mitigating evidence relevant to its sentencing determination. It does not interfere, in a constitutionally significant way, with a jury's ability to give independent weight to evidence offered in mitigation.

Kansas' procedure narrows the universe of death-eligible defendants consistent with Eighth Amendment requirements. Under Kansas law, imposition of the death penalty is an *option* only after a defendant is convicted of capital murder, which requires that one or more specific elements beyond intentional premeditated murder be found. See Kan. Stat. Ann. §21–3439. Once convicted of

capital murder, a defendant becomes *eligible* for the death penalty only if the State seeks a separate sentencing hearing, §§21–4706(c) (2003 Cum. Supp.), 21–4624(a); App. 23 (Instruction No. 2), and proves beyond a reasonable doubt the existence of one or more statutorily enumerated aggravating circumstances. Kan. Stat. Ann. §§21–4624(c), (e), and 21–4625; App. 24 (Instruction No. 3).

Consonant with the individualized sentencing requirement, a Kansas jury is permitted to consider *any* evidence relating to *any* mitigating circumstance in determining the appropriate sentence for a capital defendant, so long as that evidence is relevant. §21–4624(c). Specifically, jurors are instructed:

> "A mitigating circumstance is that which in fairness or mercy may be considered as extenuating or reducing the degree of moral culpability or blame or which justify a sentence of less than death, although it does not justify or excuse the offense. The determination of what are mitigating circumstances is for you as jurors to resolve under the facts and circumstances of this case.
>
> "The appropriateness of the exercise of mercy can itself be a mitigating factor you may consider in determining whether the State has proved beyond a reasonable doubt that the death penalty is warranted." *Id.*, at 24 (Instruction No. 4).[3]

Jurors are then apprised of, but not limited to, the factors that the defendant contends are mitigating. *Id.*, at 25–26. They are then instructed that "[e]ach juror must consider every mitigating factor that he or she individually finds to

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[3]The "mercy" jury instruction alone forecloses the possibility of *Furman*-type error as it "eliminate[s] the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty." *Post*, at 4 (SOUTER, J., dissenting).

exist." *Id.*, at 26.

Kansas' weighing equation, *ibid.* (Instruction No. 5), merely channels a jury's discretion by providing it with criteria by which it may determine whether a sentence of life or death is appropriate. The system in Kansas provides the type of "'guided discretion,'" *Walton*, 497 U. S., at 659 (citing *Gregg*, 428 U. S., at 189), we have sanctioned in *Walton*, *Boyde*, and *Blystone*.

Indeed, in *Boyde*, this Court sanctioned a weighing jury instruction that is analytically indistinguishable from the Kansas jury instruction under review today. The *Boyde* jury instruction read:

> "'If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you *shall impose* a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you *shall impose* a sentence of confinement in the state prison for life without the possibility of parole.'" 494 U. S., at 374 (emphasis in original).

Boyde argued that the mandatory language of the instruction prevented the jury from rendering an individualized sentencing determination. This Court rejected that argument, concluding that it was foreclosed by *Blystone*, where the Court rejected a nearly identical challenge to the Pennsylvania death penalty statute. 494 U. S., at 307.[4] In so holding, this Court noted that the mandatory language of the statute did not prevent the jury from *considering* all relevant mitigating evidence. *Boyde*, 494 U. S., at 374. Similarly here, §21–4624(e) does not prevent a

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[4]In *Blystone*, the Pennsylvania statute authorized imposition of a death sentence if the jury concluded "that the aggravating circumstances outweigh[ed] the mitigating circumstances present in the particular crime committed by the particular defendant, or that there [were] no such mitigating circumstances." 494 U. S., at 305.

Kansas jury from considering mitigating evidence. Marsh's argument that the Kansas provision is impermissibly mandatory is likewise foreclosed.[5]

Contrary to Marsh's argument, §21–4624(e) does not create a general presumption in favor of the death penalty in the State of Kansas. Rather, the Kansas capital sentencing system is dominated by the presumption that life imprisonment is the appropriate sentence for a capital conviction. If the State fails to meet its burden to demonstrate the existence of an aggravating circumstance(s) beyond a reasonable doubt, a sentence of life imprisonment must be imposed. §21–4624(e); App. 27 (Instruction No. 10). If the State overcomes this hurdle, then it bears the additional burden of proving beyond a reasonable doubt that aggravating circumstances are not outweighed by mitigating circumstances. *Ibid.* (Instruction No. 10); *id.*, at 26 (Instruction No. 5). Significantly, although the defendant appropriately bears the burden of proffering mitigating circumstances—a burden of production—he never bears the burden of demonstrating that mitigating circumstances outweigh aggravating circumstances.

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[5]Contrary to JUSTICE SOUTER's assertion, the Court's decisions in *Boyde* and *Blystone* did not turn on the "predominance of the aggravators" in those cases. *Post*, at 3 (dissenting opinion.). Rather, those decisions plainly turned on the fact that the mandatory language of the respective statutes did not prevent the sentencing jury from "consider[ing] and giv[ing] effect to all relevant mitigating evidence." *Blystone*, *supra*, at 305. See also *Boyde*, 494 U. S., at 377 ("[T]he legal principle we expounded in *Blystone* clearly requires rejection of Boyde's claim as well, because the mandatory language of [California jury instruction] 8.84.2 is not alleged to have interfered with the consideration of mitigating evidence"). The language of the Kansas statute at issue here no more "dictate[s] death," *post*, at 3, than the mandatory language at issue in *Boyde* and *Blystone*. See *Blystone*, *supra*, at 305 (explaining that the Pennsylvania statute is not "'mandatory' as that term was understood in *Woodson* [v. *North Carolina*, 428 U. S. 280 (1976)] or *Roberts* [v. *Louisiana*, 428 U. S. 325 (1976)]" because "[d]eath is not automatically imposed upon conviction for certain types of murder").

Instead, the State always has the burden of demonstrating that mitigating evidence does not outweigh aggravating evidence. Absent the State's ability to meet that burden, the default is life imprisonment. Moreover, if the jury is unable to reach a unanimous decision—in any respect—a sentence of life must be imposed. §21–4624(e); App. 28 (Instruction No. 12). This system does not create a presumption that death is the appropriate sentence for capital murder.[6]

Nor is there any force behind Marsh's contention that an equipoise determination reflects juror confusion or inability to decide between life and death, or that a jury may use equipoise as a loophole to shirk its constitutional duty to render a reasoned, moral decision, see *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring), regarding whether death is an appropriate sentence for a particular defendant. Such an argument rests on an implausible characterization of the Kansas statute—that a jury's determination that aggravators and mitigators are in equipoise is not a *decision*, much less a decision *for death*—and thus misses the mark. Cf. *post*, at 4–5 (SOUTER, J., dissenting) (arguing that Kansas' weighing equation undermines individualized sentencing). Weighing is not an end; it is merely a means to reaching a decision. The decision the jury must reach is whether life or death is the appropriate punishment. The Kansas jury instructions clearly inform the jury that a determination that the evidence is in equipoise is a decision for—not a

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[6]Additionally, Marsh's argument turns on reading §21–4624(e) in isolation. Such a reading, however, is contrary to "'the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" *Boyde* v. *California*, 494 U. S. 370, 378 (1990) (citing *Boyd* v. *United States*, 271 U. S. 104, 107 (1926)). The constitutionality of a State's death penalty system turns on review of that system in context. We thus reject his disengaged interpretation of §21–4624(e).

presumption in favor of—death. Kansas jurors, presumed to follow their instructions, are made aware that: a determination that mitigators outweigh aggravators is a decision that a life sentence is appropriate; a determination that aggravators outweigh mitigators *or* a determination that mitigators do not outweigh aggravators—including a finding that aggravators and mitigators are in balance—is a decision that death is the appropriate sentence; and an inability to reach a unanimous decision will result in a sentence of life imprisonment. So informed, far from the abdication of duty or the inability to select an appropriate sentence depicted by Marsh and JUSTICE SOUTER, a jury's conclusion that aggravating evidence and mitigating evidence are in equipoise is a *decision for death* and is indicative of the type of measured, normative process in which a jury is constitutionally tasked to engage when deciding the appropriate sentence for a capital defendant.

V

JUSTICE SOUTER argues (hereinafter the dissent) that the advent of DNA testing has resulted in the "exonerati[on]" of "innocent" persons "in numbers never imagined before the development of DNA tests." *Post*, at 5–6. Based upon this "new empirical demonstration of how 'death is different,'" *post*, at 8, the dissent concludes that Kansas' sentencing system permits the imposition of the death penalty in the absence of reasoned moral judgment.

But the availability of DNA testing, and the questions it might raise about the accuracy of guilt-phase determinations in capital cases, is simply irrelevant to the question before the Court today, namely, the constitutionality of Kansas' capital *sentencing* system. Accordingly, the accuracy of the dissent's factual claim that DNA testing has established the "innocence" of numerous convicted persons under death sentences—and the incendiary debate it

invokes—is beyond the scope of this opinion.[7]

The dissent's general criticisms against the death penalty are ultimately a call for resolving all legal disputes in capital cases by adopting the outcome that makes the death penalty more difficult to impose. While such a bright-line rule may be easily applied, it has no basis in law. Indeed, the logical consequence of the dissent's argument is that the death penalty can only be just in a system that does not permit error. Because the criminal justice system does not operate perfectly, abolition of the death penalty is the only answer to the moral dilemma the dissent poses. This Court, however, does not sit as a moral authority. Our precedents do not prohibit the States from authorizing the death penalty, even in our imperfect system. And those precedents do not empower this Court to chip away at the States' prerogatives to do so on the grounds the dissent invokes today.

* * *

We hold that the Kansas capital sentencing system, which directs imposition of the death penalty when a jury finds that aggravating and mitigating circumstances are

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[7]But see The Penalty of Death, in Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case, 117, 127–132, 134, (H. Bedau & P. Cassell eds. 2004). See also Comment, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 126–145 (1988) (examining accuracy in use of the term "innocent" in death penalty studies and literature); Marquis, The Myth of Innocence, 95 J. Crim. L. & C. 501, 508 (2005) ("[w]ords like 'innocence' convey enormous moral authority and are intended to drive the public debate by appealing to a deep and universal revulsion at the idea that someone who is genuinely blameless could wrongly suffer for a crime in which he had no involvement"); *People* v. *Smith*, 185 Ill. 2d 532, 545, 708 N. E. 2d 365, 371 (1999) ("[w]hile a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. . . . Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof").

in equipoise, is constitutional. Accordingly, we reverse the judgment of the Kansas Supreme Court, and remand the case for further proceedings not inconsistent with this opinion.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

No. 04–1170

KANSAS, PETITIONER *v.* MICHAEL LEE MARSH, II

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 2006]

JUSTICE SCALIA, concurring.

I join the opinion of the Court. I write separately to clarify briefly the import of my joinder, and to respond at somewhat greater length first to JUSTICE STEVENS' contention that this case, and cases like it, do not merit our attention, and second to JUSTICE SOUTER's claims about risks inherent in capital punishment.

I

Part III of the Court's opinion—which makes plain why *Walton* v. *Arizona*, 497 U. S. 639 (1990), controls this case—would be sufficient to reverse the judgment below. I nonetheless join Part IV as well, which describes why Kansas's death penalty statute easily satisfies even a capital jurisprudence as incoherent as ours has become. In doing so, I do not endorse that incoherence, but adhere to my previous statement that "I will not . . . vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted." *Id.*, at 673 (concurring in part and concurring in judgment).

II

JUSTICE STEVENS' dissent gives several reasons why this case, and any criminal case in which the State is the petitioner, does not deserve our attention. "'[N]o rule of law,'" he says, "'commanded the Court to grant certiorari.'" *Post*, at 3 (quoting *California* v. *Ramos*, 463 U. S.

992, 1031 (1983) (STEVENS, J., dissenting)). But that is true, of course, of almost our entire docket; it is in the very nature of certiorari jurisdiction. Also self-evident, since the jurisdiction of the Kansas Supreme Court ends at the borders of that State, is the fact that "'[n]o other State would have been required to follow the [Kansas] precedent if it had been permitted to stand.'" *Post*, at 3 (STEVENS, J., dissenting) (quoting *Ramos*, *supra*, at 1031 (STEVENS, J., dissenting)). But if this signaled the impropriety of granting certiorari, we would never review state-court determinations of federal law, even though they patently contradict (as the determination below does) the holdings of other state courts and Federal Courts of Appeals, compare 278 Kan. 520, 534–537, 102 P. 3d 445, 457–459 (2004) (case below), and *State* v. *Kleypas*, 272 Kan. 894, 1005–1007, 40 P. 3d 139, 225–226 (2001), with, *e.g.*, *State* v. *Hoffman*, 123 Idaho 638, 646–647, 851 P. 2d 934, 942–943 (1993), and *Jones* v. *Dugger*, 928 F. 2d 1020, 1029 (CA11 1991)—and indeed, even when they patently contradict our own decisions. Our principal responsibility under current practice, however, and a primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions, see Art. III, §2, cls. 1 and 2, is to ensure the integrity and uniformity of federal law.[1] See

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[1]The dissent observes that Congress did not initially grant us the full jurisdiction that the Constitution authorizes, but only allowed us to review cases *rejecting* the assertion of governing federal law. See *post*, at 3–4, n. (opinion of STEVENS, J.). That is unsurprising and immaterial. The original Constitution contained few guarantees of individual rights against the States, and in clashes of governmental authority there was small risk that the state courts would erroneously side with the new Federal Government. (In 1789, when the first Judiciary Act was passed, the Bill of Rights had not yet been adopted, and once it was, it did not apply against the States, see *Barron ex rel. Tiernan* v. *Mayor of Baltimore*, 7 Pet. 243 (1833).) Congress would have been most unlikely to contemplate that state courts would erroneously invalidate state actions on federal grounds. The early history of our jurisdiction

this Court's Rule 10(b), (c). Fulfillment of this responsibility is, to put it mildly, an adequate answer to the charge that "'[n]othing more than an interest in facilitating the imposition of the death penalty in [Kansas] justified this Court's exercise of its discretion to review the judgment of the [Kansas] Supreme Court.'" *Post*, at 3 (STEVENS, J., dissenting) (quoting *Ramos*, *supra*, at 1031 (STEVENS, J., dissenting)).

The dissent's assertion that our holding in *Ramos* was "ironi[c]," *post*, at 2 (opinion of STEVENS, J.), rests on a misguided view of federalism and, worse still, of a republican form of government. Only that can explain the dissent's suggestion that *Ramos*'s reversal of a state-court determination somehow undermined state authority. The California Supreme Court had ruled that a jury instruction inserted into the state penal code by voter initiative, see 463 U. S., at 995, n. 4, was invalid *as a matter of federal constitutional law*. See *id.*, at 996, 997, n. 7. When state courts erroneously invalidate actions taken by the people of a State (through initiative or through normal operation of the political branches of their state government) on *state-law* grounds, it is generally none of our business; and our displacing of those judgments would indeed be an intrusion upon state autonomy. But when state courts erroneously invalidate such actions because

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assuredly does not support the dissent's awarding of special preference to the constitutional rights of criminal defendants. Even with respect to *federal* defendants (who *did* enjoy the protections of the Bill of Rights), "during the first 100 years of the Court's existence there was no provision made by Congress for Supreme Court review of federal criminal convictions, an omission that Congress did not remedy until 1889 and beyond." R. Stern, E. Gressman, S. Shapiro, & K. Geller, Supreme Court Practice 66 (8th ed. 2002). In any case, *present* law is plain. The 1988 statute cited by the dissent and forming the basis of our current certiorari jurisdiction places States and defendants in precisely the same position. They are both entitled to petition for our review.

they believe federal law requires it—and *especially* when they do so because they believe the Federal *Constitution* requires it—review by this Court, far from *undermining* state autonomy, is the only possible way to *vindicate* it. When a federal constitutional interdict against the duly expressed will of the people of a State is erroneously pronounced by a State's highest court, no authority in the State—not even a referendum agreed to by all its citizens—can undo the error. Thus, a general presumption against such review displays not respect for the States, but a complacent willingness to allow judges to strip the people of the power to govern themselves. When we correct a state court's federal errors, *we return power to the State, and to its people.*

That is why our decision in *Ramos* was necessary. Our solemn responsibility is not merely to determine whether a State Supreme Court "ha[s] adequately protected [a defendant's] rights under the Federal Constitution," *post*, at 2 (STEVENS, J., dissenting). It is to ensure that when courts speak in the name of the Federal Constitution, they disregard none of its guarantees—neither those that assure the rights of criminal defendants, nor those that assure what Justice Black, in his famous dissent in *In re Winship*, 397 U. S. 358, 385 (1970), called "the most fundamental individual liberty of our people—the right of each man to participate in the self-government of his society." Turning a blind eye to federal constitutional error that benefits criminal defendants, allowing it to permeate in varying fashion each state Supreme Court's jurisprudence, would change the uniform "law of the land" into a crazy quilt. And on top of it all, of course, what the dissent proposes avowedly favors one party to the case: When a criminal defendant loses a questionable constitutional point, we may grant review; when the State loses, we must deny it. While it might be appropriate for Congress to place such a thumb upon the scales of our power

to review, it seems to me a peculiar mode of decisionmaking for judges sworn to "impartially discharge . . . all the duties" of their office, 28 U. S. C. §453.

Our decision to grant certiorari is guided by the considerations set forth in Rule 10. None of them turns on the identity of the party that the asserted misapplication of federal law has harmed. When state legislation is thwarted—not on the basis of state law, but on the basis of a questionable application of the Federal Constitution or laws—I shall continue to vote to grant the resulting petition for certiorari.

III

Finally, I must say a few words (indeed, more than a few) in response to Part III of JUSTICE SOUTER's dissent. This contains the disclaimer that the dissenters are not (*yet*) ready to "generaliz[e] about the soundness of capital sentencing across the country," *post*, at 9; but that is in fact precisely what they do. The dissent essentially argues that capital punishment is such an undesirable institution—it results in the condemnation of such a large number of innocents—that any legal rule which eliminates its pronouncement, including the one favored by the dissenters in the present case, should be embraced. *See ibid.*

As a general rule, I do not think it appropriate for judges to heap either praise or censure upon a legislative measure that comes before them, lest it be thought that their validation, invalidation, or interpretation of it is driven by their desire to expand or constrict what they personally approve or disapprove as a matter of policy. In the present case, for example, people might leap to the conclusion that the dissenters' views on whether Kansas' equipoise rule is constitutional are determined by their personal disapproval of an institution that has been democratically adopted by 38 States and the United States. But of course that requires no leap; just a willingness to

take the dissenters at their word. For as I have described, the dissenters' very argument is that imposition of the death penalty should be minimized by invalidation of the equipoise rule because it is a bad, "risk[y]," and "hazard[ous]" idea, *ibid.* A broader conclusion that people should derive, however (and I would not consider this much of a leap either), is that the dissenters' encumbering of the death penalty in *other* cases, with unwarranted restrictions neither contained in the text of the Constitution nor reflected in two centuries of practice under it, will be the product of their policy views—views not shared by the vast majority of the American people. The dissenters' proclamation of their policy agenda in the present case is especially striking because it is nailed to the door of the wrong church—that is, set forth in a case litigating a rule that has nothing to do with the evaluation of guilt or innocence. There are, of course, many cases in which the rule at issue *does* serve that function, see, *e.g.*, *House* v. *Bell*, 547 U. S. ___ (2006). (Marsh himself has earned a remand by application of one such rule, see *ante*, at 2–3.) But as the Court observes, see *ante*, at 16–17, guilt or innocence is logically disconnected to the challenge in *this* case to *sentencing* standards. The *only* time the equipoise provision is relevant is when the State has proved a defendant guilty of a capital crime.[2]

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[2]Not only are the dissent's views on the erroneous imposition of the death penalty irrelevant to the present case, but the dissent's proposed holding on the equipoise issue will not necessarily work to defendants' advantage. The equipoise provision of the Kansas statute imposes the death penalty only when the State proves *beyond a reasonable doubt* that mitigating factors do not outweigh the aggravators. See *ante*, at 2. If we were to disallow Kansas's scheme, the State could, as Marsh freely admits, replace it with a scheme requiring the State to prove *by a mere preponderance of the evidence* that the aggravators outweigh the mitigators. See Tr. of Oral Rearg. 36. I doubt that any defense counsel would accept this trade. The "preponderance" rule, while it sounds better, would almost surely produce more death sentences than an

There exists in some parts of the world sanctimonious criticism of America's death penalty, as somehow unworthy of a civilized society. (I say sanctimonious, because most of the countries to which these finger-waggers belong had the death penalty themselves until recently—and indeed, many of them would still have it if the democratic will prevailed.[3]) It is a certainty that the opinion of a near-majority of the United States Supreme Court to the effect that our system condemns many innocent defendants to death will be trumpeted abroad as vindication of these criticisms. For that reason, I take the trouble to point out that the dissenting opinion has nothing substantial to support it.

It should be noted at the outset that the dissent does not discuss a single case—not one—in which it is clear that a person was executed for a crime he did not commit. If such an event had occurred in recent years, we would not

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"equipoise beyond a reasonable doubt" requirement.

[3] It is commonly recognized that "[m]any European countries . . . abolished the death penalty in spite of public opinion rather than because of it." Bibas, Transparency and Participation in Criminal Procedure, 81 N. Y. U. L. Rev. 911, 931–932 (2006). See also *id.*, at 932, n. 88. Abolishing the death penalty has been made a condition of joining the Council of Europe, which is in turn a condition of obtaining the economic benefits of joining the European Union. See Waters, Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 Geo. L. J. 487, 525 (2005); Demleitner, Is There a Future for Leniency in the U. S. Criminal Justice System? 103 Mich. L. Rev. 1231, 1256, and n. 88 (2005). The European Union advocates against the death-penalty even *in America;* there is a separate death-penalty page on the website of the Delegation of the European Commission to the U. S. A. See http://www.eurunion.org/legislat/deathpenalty/deathpenhome.htm (as visited June 17, 2006, and available in Clerk of Court's case file). The views of the European Union have been relied upon by Justices of this Court (including all four dissenters today) in narrowing the power of the American people to impose capital punishment. See, *e.g.*, *Atkins* v. *Virginia*, 536 U. S. 304, 317, n. 21 (2002) (citing, for the views of "the world community," the Brief for the European Union as *Amicus Curiae*).

have to hunt for it; the innocent's name would be shouted from the rooftops by the abolition lobby. The dissent makes much of the new-found capacity of DNA testing to establish innocence. But in every case of an executed defendant of which I am aware, that technology has *confirmed* guilt.

This happened, for instance, only a few months ago in the case of Roger Coleman. Coleman was convicted of the gruesome rape and murder of his sister-in-law, but he persuaded many that he was actually innocent and became the poster-child for the abolitionist lobby. See Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., Washington Post, Jan. 13, 2006, p. A1; Dao, DNA Ties Man Executed in '92 to the Murder He Denied, N. Y. Times, Jan. 13, 2006, p. A14. Around the time of his eventual execution, "his picture was on the cover of Time magazine ('This Man Might Be Innocent. This Man Is Due to Die'). He was interviewed from death row on 'Larry King Live,' the 'Today' show, 'Primetime Live,' 'Good Morning America' and 'The Phil Donahue Show.'" Frankel, Burden of Proof, Washington Post, May 14, 2006, pp. W8, W11. Even one Justice of this Court, in an opinion filed shortly before the execution, cautioned that "Coleman has now produced substantial evidence that he may be innocent of the crime for which he was sentenced to die." *Coleman* v. *Thompson*, 504 U. S. 188, 189 (1992) (Blackmun, J., dissenting). Coleman ultimately failed a lie-detector test offered by the Governor of Virginia as a condition of a possible stay; he was executed on May 20, 1992. Frankel, *supra*, at W23; Glod & Shear, Warner Orders DNA Testing in Case of Man Executed in '92, Washington Post, Jan. 6, 2006, pp. A1, A6.

In the years since then, Coleman's case became a rallying point for abolitionists, who hoped it would offer what they consider the "Holy Grail: proof from a test tube that an innocent person had been executed." Frankel, *supra*, at

W24. But earlier this year, a DNA test ordered by a later Governor of Virginia proved that Coleman was guilty, see, *e.g.*, Glod & Shear, DNA Tests Confirm Guilt of Man Executed by Va., *supra*, at A1; Dao, *supra*, at A14, even though his defense team had "proved" his innocence and had even identified "the real killer" (with whom they eventually settled a defamation suit). See Frankel, *supra*, at W23. And Coleman's case is not unique. See Truth and Consequences: The Penalty of Death, in Debating the Death Penalty: Should America Have Capital Punishment? The Experts on Both Sides Make Their Best Case, 128–129 (H. Bedau & P. Cassell eds. 2004) (discussing the cases of supposed innocents Rick McGinn and Derek Barnabei, whose guilt was also confirmed by DNA tests).

Instead of identifying and discussing any particular case or cases of mistaken execution, the dissent simply cites a handful of studies that bemoan the alleged prevalence of wrongful death sentences. One study (by Lanier and Acker) is quoted by the dissent as claiming that "'more than 110' death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and 'hundreds of additional wrongful convictions in potentially capital cases have been documented over the past century.'" *Post*, at 8 (opinion of SOUTER, J.). For the first point, Lanier and Acker cite the work of the Death Penalty Information Center (more about that below) and an article in a law review jointly authored by Radelet, Lofquist, and Bedau (two professors of sociology and a professor of philosophy). For the second point, they cite only a 1987 article by Bedau and Radelet. See Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21. In the very same paragraph which the dissent quotes, Lanier and Acker also refer to that 1987 article as "hav[ing] identified 23 individuals who, in their judgment, were convicted and executed in this country during the 20th century notwithstanding their innocence." Lanier &

Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577, 593 (2004). This 1987 article has been highly influential in the abolitionist world. Hundreds of academic articles, including those relied on by today's dissent, have cited it. It also makes its appearance in judicial decisions—cited recently in a six-judge dissent in *House* v. *Bell*, 386 F. 3d 668, 708 (CA6 2004) (en banc) (Merritt, J., dissenting), for the proposition that "the system is allowing some innocent defendants to be executed." The article therefore warrants some further observations.

The 1987 article's obsolescence began at the moment of publication. The most recent executions it considered were in 1984, 1964, and 1951; the rest predate the Allied victory in World War II. (Two of the supposed innocents are Sacco and Vanzetti.) Bedau & Radelet, *supra*, at 73. Even if the innocence claims made in this study were true, all except (perhaps) the 1984 example would cast no light upon the functioning of our current system of capital adjudication. The legal community's general attitude toward criminal defendants, the legal protections States afford, the constitutional guarantees this Court enforces, and the scope of federal habeas review, are all vastly different from what they were in 1961. So are the scientific means of establishing guilt, and hence innocence—which are now so striking in their operation and effect that they are the subject of more than one popular TV series. (One of these new means, of course, is DNA testing—which the dissent seems to think is primarily a way to identify defendants erroneously convicted, rather than a highly effective way to avoid conviction of the innocent.)

But their current relevance aside, this study's conclusions are unverified. And if the support for its most significant conclusion—the execution of 23 innocents in the 20th century—is any indication of its accuracy, neither it, nor any study so careless as to rely upon it, is worthy of

credence. The only execution of an innocent man it alleges to have occurred after the restoration of the death penalty in 1976—the Florida execution of James Adams in 1984—is the easiest case to verify. As evidence of Adams' innocence, it describes a hair that could not have been his as being "clutched in the victim's hand," Bedau & Radelet, *supra*, at 91. The hair was *not* in the victim's hand; "[i]t was a remnant of a sweeping of the ambulance and so could have come from another source." Markman & Cassell, Protecting the Innocent: A Response to the Bedau-Radelet Study, 41 Stan. L. Rev. 121, 131 (1988). The study also claims that a witness who "heard a voice inside the victim's home at the time of the crime" testified that the "voice was a woman's," Bedau & Radelet, *supra*, at 91. The witness's actual testimony was that the voice, which said "'"In the name of God, don't do it"'" (and was hence unlikely to have been the voice of anyone but the male victim), "'sounded "kind of like a woman's voice, kind of like strangling or something . . . ."'" Markman & Cassell, Protecting the Innocent, at 130. Bedau and Radelet failed to mention that upon arrest on the afternoon of the murder Adams was found with some $200 in his pocket—one bill of which "was stained with type O blood. When Adams was asked about the blood on the money, he said that it came from a cut on his finger. His blood was type AB, however, while the victim's was type O." *Id.*, at 132. Among the other unmentioned, incriminating details: that the victim's *eyeglasses* were found in Adams' car, along with jewelry belonging to the victim, and clothing of Adams' stained with type O blood. *Ibid.* This is just a sample of the evidence arrayed against this "innocent." See *id.*, at 128–133, 148–150.

Critics have questioned the study's findings with regard to all its other cases of execution of alleged innocents for which "appellate opinions . . . set forth the facts proved at trial in detail sufficient to permit a neutral observer to

assess the validity of the authors' conclusions." *Id.*, at 134. (For the rest, there was not "a reasonably complete account of the facts . . . readily available," *id.*, at 145.) As to those cases, the only readily verifiable ones, the authors of the 1987 study later acknowledged, "We agree with our critics that we have not 'proved' these executed defendants to be innocent; we never claimed that we had." Bedau & Radelet, The Myth of Infallibility: A Reply to Markman and Cassell, 41 Stan. L. Rev. 161, 164 (1988). One would have hoped that this disclaimer of the study's most striking conclusion, if not the study's dubious methodology, would have prevented it from being cited as authority in the pages of the United States Reports. But alas, it is too late for that. Although today's dissent relies on the study only indirectly, the two dissenters who were on the Court in January 1993 have already embraced it. "One impressive study," they noted (referring to the 1987 study), "has concluded that 23 innocent people have been executed in the United States in this century, including one as recently as 1984." *Herrera* v. *Collins*, 506 U. S. 390, 430, n. 1 (1993) (Blackmun, J., joined by STEVENS and SOUTER, JJ., dissenting).[4]

Remarkably avoiding any claim of erroneous executions, the dissent focuses on the large numbers of *non*-executed "exonerees" paraded by various professors. It speaks as though exoneration came about through the operation of some outside force to correct the mistakes of our legal system, rather than *as a consequence of the functioning of our legal system*. Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent

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[4]See also *Callins* v. *Collins*, 510 U. S. 1141, 1158, n. 8 (1994) (Blackmun, J., dissenting from denial of certiorari) ("Innocent persons *have* been executed, see Bedau & Radelet, Miscarriages of Justice in Potentially Capital Cases, 40 Stan. L. Rev. 21, 36, 173–179 (1987), perhaps recently, see *Herrera* v. *Collins*, 506 U. S. 390 (1993), and will continue to be executed under our death penalty scheme").

condemnee through executive clemency, demonstrates not the failure of the system but its success. Those devices are part and parcel of the multiple assurances that are applied before a death sentence is carried out.

Of course even in identifying exonerees, the dissent is willing to accept anybody's say-so. It engages in no critical review, but merely parrots articles or reports that support its attack on the American criminal justice system. The dissent places significant weight, for instance, on the Illinois Report (compiled by the appointees of an Illinois Governor who had declared a moratorium upon the death penalty and who eventually commuted all death sentences in the State, see Warden, Illinois Death Penalty Reform: How It Happened, What It Promises, 95 J. Crim. L. & C. 381, 406–407, 410 (2006)), which it claims shows that "false verdicts" are "remarkable in number." *Post*, at 9 (opinion of SOUTER, J.). The dissent claims that this Report identifies 13 inmates released from death row after they were determined to be innocent. To take one of these cases, discussed by the dissent as an example of a judgment "as close to innocence as any judgments courts normally render," *post*, at 7, n. 2: In *People* v. *Smith*, 185 Ill. 2d 532, 708 N. E. 2d 365 (1999) the defendant was twice convicted of murder. After his first trial, the Supreme Court of Illinois "reversed [his] conviction based upon certain evidentiary errors" and remanded his case for a new trial. *Id.*, at 534, 708 N. E. 2d, at 366. The second jury convicted Smith again. The Supreme Court of Illinois again reversed the conviction because it found that the evidence was insufficient to establish guilt beyond a reasonable doubt. *Id.*, at 542–543, 708 N. E. 2d, at 370–371. The court explained:

> "While a not guilty finding is sometimes equated with a finding of innocence, that conclusion is erroneous. Courts do not find people guilty or innocent. . . . A not

> guilty verdict expresses no view as to a defendant's innocence. Rather, [a reversal of conviction] indicates simply that the prosecution has failed to meet its burden of proof." *Id.*, at 545, 708 N. E. 2d, at 371.

This case alone suffices to refute the dissent's claim that the Illinois Report distinguishes between "exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact," *post*, at 7, n. 2. The broader point, however, is that it is utterly impossible to regard "exoneration"—however casually defined—as a failure of the capital justice system, rather than as a vindication of its effectiveness in releasing not only defendants who are innocent, but those whose guilt has not been established beyond a reasonable doubt.

Another of the dissent's leading authorities on exoneration of the innocent is Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523 (2006) (hereinafter Gross). The dissent quotes that study's self-congratulatory "criteria" of exoneration—seemingly so rigorous that no one could doubt the study's reliability. See *post*, at 8, n. 3 (opinion of SOUTER, J.). But in fact that article, like the others cited, is notable not for its rigorous investigation and analysis, but for the fervor of its belief that the American justice system is condemning the innocent "in numbers," as the dissent puts it, "never imagined before the development of DNA tests." *Post*, at 6 (opinion of SOUTER, J.). Among the article's list of 74 "exonerees," Gross 529, is Jay Smith of Pennsylvania. Smith—a school principal—earned three death sentences for slaying one of his teachers and her two young children. See *Smith* v. *Holtz*, 210 F. 3d 186, 188 (CA3 2000). His retrial for triple murder was barred on double jeopardy grounds because of prosecutorial misconduct during the first trial. *Id.*, at 194.

But Smith could not leave well enough alone. He had the gall to sue, under 42 U. S. C. §1983, for false imprisonment. The Court of Appeals for the Third Circuit affirmed the jury verdict for the defendants, observing along the way that "our confidence in Smith's convictions is not diminished in the least. We remain firmly convinced of the integrity of those guilty verdicts." 210 F. 3d, at 198.

Another "exonerated" murderer in the Gross study is Jeremy Sheets, convicted in Nebraska. His accomplice in the rape and murder of a girl had been secretly tape recorded; he "admitted that he drove the car used in the murder . . . , and implicated Sheets in the murder." *Sheets* v. *Butera*, 389 F. 3d 772, 775 (CA8 2004). The accomplice was arrested and eventually described the murder in greater detail, after which a plea agreement was arranged, conditioned on the accomplice's full cooperation. *Ibid.* The resulting taped confession, which implicated Sheets, was "[t]he crucial portion of the State's case," *State* v. *Sheets*, 260 Neb. 325, 327, 618 N. W. 2d 117, 122 (2000). But the accomplice committed suicide in jail, depriving Sheets of the opportunity to cross-examine him. This, the Nebraska Supreme Court held, rendered the evidence inadmissible under the Sixth Amendment. *Id.*, at 328, 335–351, 618 N. W. 2d, at 123, 127–136. After the central evidence was excluded, the State did not retry Sheets. *Sheets* v. *Butera*, 389 F. 3d, at 776. Sheets brought a §1983 claim; the U. S. Court of Appeals for the Eighth Circuit affirmed the District Court's grant of summary judgment against him. *Id.*, at 780. Sheets also sought the $1,000 he had been required to pay to the Nebraska Victim's Compensation Fund; the State Attorney General—far from concluding that Sheets had been "exonerated" and was entitled to the money—refused to return it. The court action left open the possibility that Sheets could be retried, and the Attorney General did "not believe the reversal on the ground of improper admission of evidence

. . . is a favorable disposition of charges," Neb. Op. Atty. Gen. No. 01036 (Nov. 9), 2001 WL 1503144, *3.

In its inflation of the word "exoneration," the Gross article hardly stands alone; mischaracterization of reversible error as actual innocence is endemic in abolitionist rhetoric, and other prominent catalogues of "innocence" in the death-penalty context suffer from the same defect. Perhaps the best-known of them is the List of Those Freed From Death Row, maintained by the Death Penalty Information Center. See http://www.deathpenaltyinfo.org/article.php?scid=6&did=110. This includes the cases from the Gross article described above, but also enters some dubious candidates of its own. Delbert Tibbs is one of them. We considered his case in *Tibbs* v. *Florida*, 457 U. S. 31 (1982), concluding that the Double Jeopardy Clause does not bar a retrial when a conviction is "revers[ed] based on the weight, rather than the sufficiency, of the evidence," *id.*, at 32. The case involved a man and a woman hitchhiking together in Florida. A driver who picked them up sodomized and raped the woman, and killed her boyfriend. She eventually escaped and positively identified Tibbs. See *id.*, at 32–33. The Florida Supreme Court reversed the conviction on a 4-to-3 vote. 337 So. 2d 788 (1976). The Florida courts then grappled with whether Tibbs could be retried without violating the Double Jeopardy Clause. The Florida Supreme Court determined not only that there was no double-jeopardy problem, 397 So. 2d 1120, 1127 (1981) (*per curiam*), but that the *very basis on which it had reversed the conviction was no longer valid law*, *id.*, at 1125, and that its action in "reweigh[ing] the evidence" in Tibbs' case had been "clearly improper," *id.*, at 1126. After we affirmed the Florida Supreme Court, however, the State felt compelled to drop the charges. The State Attorney explained this to the Florida Commission on Capital Cases: "'By the time of the retrial, [the] witness/victim . . . had

progressed from a marijuana smoker to a crack user and I could not put her up on the stand, so I declined to prosecute. Tibbs, in my opinion, was never an innocent man wrongfully accused. He was a lucky human being. He was guilty, he was lucky and now he is free. His 1974 conviction was not a miscarriage of justice.'" Florida Commission on Capital Cases, Case Histories: A Review of 24 Individuals Released From Death Row 136–137 (rev. Sept. 10, 2002) http://www.floridacapitalcases.state.fl.us/Publications/innocentsproject.pdf. Other state officials involved made similar points. *Id.*, at 137.

Of course, even with its distorted concept of what constitutes "exoneration," the claims of the Gross article are fairly modest: Between 1989 and 2003, the authors identify 340 "exonerations" *nationwide*—not just for capital cases, mind you, nor even just for murder convictions, but for various felonies. Gross 529. Joshua Marquis, a district attorney in Oregon, recently responded to this article as follows:

> "[L]et's give the professor the benefit of the doubt: let's assume that he understated the number of innocents by roughly a factor of 10, that instead of 340 there were 4,000 people in prison who weren't involved in the crime in any way. During that same 15 years, there were more than 15 million felony convictions across the country. That would make the error rate .027 percent—or, to put it another way, a success rate of 99.973 percent." The Innocent and the Shammed, N. Y. Times, Jan. 26, 2006, p. A23.

The dissent's suggestion that capital defendants are *especially* liable to suffer from the lack of 100% perfection in our criminal justice system is implausible. Capital cases are given especially close scrutiny at every level, which is why in most cases many years elapse before the sentence is executed. And of course capital cases receive special

attention in the application of executive clemency. Indeed, one of the arguments made by abolitionists is that the process of finally completing all the appeals and reexaminations of capital sentences is so lengthy, and thus so expensive for the State, that the game is not worth the candle. The proof of the pudding, of course, is that as far as anyone can determine (and many are looking), *none* of cases included in the .027% error rate for American verdicts involved a capital defendant erroneously executed.

Since 1976 there have been approximately a half million murders in the United States. In that time, 7,000 murderers have been sentenced to death; about 950 of them have been executed; and about 3,700 inmates are currently on death row. See Marquis, The Myth of Innocence, 95 J. Crim. L. & C. 501, 518 (2006). As a consequence of the sensitivity of the criminal justice system to the due-process rights of defendants sentenced to death, almost two-thirds of all death sentences are overturned. See *ibid.* "Virtually none" of these reversals, however, are attributable to a defendant's "'actual innocence.'" *Ibid.* Most are based on legal errors that have little or nothing to do with guilt. See *id.*, at 519–520. The studies cited by the dissent demonstrate nothing more.

Like other human institutions, courts and juries are not perfect. One cannot have a system of criminal punishment without accepting the possibility that someone will be punished mistakenly. That is a truism, not a revelation. But with regard to the punishment of death in the current American system, that possibility has been reduced to an insignificant minimum. This explains why those ideologically driven to ferret out and proclaim a mistaken modern execution have not a single verifiable case to point to, whereas it is easy as pie to identify plainly guilty murderers who have been set free. The American people have determined that the good to be derived from capital punishment—in deterrence, and perhaps most of

all in the meting out of condign justice for horrible crimes—outweighs the risk of error. It is no proper part of the business of this Court, or of its Justices, to second-guess that judgment, much less to impugn it before the world, and less still to frustrate it by imposing judicially invented obstacles to its execution.

# SUPREME COURT OF THE UNITED STATES

No. 04–1170

KANSAS, PETITIONER *v.* MICHAEL LEE MARSH, II

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 2006]

JUSTICE STEVENS, dissenting.

Having joined Justice Blackmun's dissent from the plurality's opinion in *Walton* v. *Arizona*, 497 U. S. 639, 649–652 (1990), I necessarily also subscribe to the views expressed by JUSTICE SOUTER today. I write separately for two reasons: to explain why agreement with Justice Blackmun's dissent is fully consistent with refusing to read *Walton* as "control[ling]," but see *ante*, at 5 (opinion of the Court), and to explain why the grant of certiorari in this case was a misuse of our discretion.

Under Justice Blackmun's understanding of Arizona law, *Walton* did present exactly the same issue before us today. The Arizona statute at issue required the judge to impose death upon finding aggravating factors if "'there are no mitigating circumstances sufficiently substantial to call for leniency.'" 497 U. S., at 644 (quoting Ariz. Rev. Stat. Ann. §13–703(E) (West 1989)). In Justice Blackmun's view, Arizona case law indicated "that a defendant's mitigating evidence will be deemed 'sufficiently substantial to call for leniency' only if the mitigating factors 'outweigh' those in aggravation." 497 U. S., at 687. Accordingly, Justice Blackmun believed that we confronted the constitutionality of a statute that mandated death when the scales were evenly balanced. *Ibid.*

But Justice Blackmun never concluded that the plurality similarly read Arizona case law as "requir[ing] a capital sentence in a case where aggravating and mitigating

circumstances are evenly balanced." *Id.*, at 688. To the contrary, he observed that "the plurality does not even acknowledge that this is the dispositive question." *Ibid.* Because Justice Blackmun did not read the plurality opinion as confronting the problem of equipoise that he believed Arizona law to present, my join of his dissent is consistent with my conclusion that *stare decisis* does not bind us today. As JUSTICE SOUTER explains, *post*, at 2, n. 1, the *Walton* plurality painstakingly avoided an express endorsement of a rule that allows a prosecutor to argue, and allows a judge to instruct the jury, that if the scales are evenly balanced when the choice is between life and death, the law requires the more severe penalty.

There is a further difference between this case and *Walton*—one that should have kept us from granting certiorari in the first place. In *Walton*, the defendant petitioned for certiorari, and our grant enabled us to consider whether the Arizona Supreme Court had adequately protected his rights under the Federal Constitution. In this case, by contrast, the State of Kansas petitioned us to review a ruling of its own Supreme Court on the grounds that the Kansas court had granted more protection to a Kansas litigant than the Federal Constitution required. A policy of judicial restraint would allow the highest court of the State to be the final decisionmaker in a case of this kind. See *Brigham City* v. *Stuart*, 547 U. S. __, __ (2006) (STEVENS, J., concurring) (slip op., at 3).

There is a remarkable similarity between the decision to grant certiorari in this case and our comparable decision in *California* v. *Ramos*, 463 U. S. 992 (1983). In *Ramos*, we reviewed a decision of the California Supreme Court that had invalidated a standard jury instruction concerning the Governor's power to commute life without parole sentences—an instruction that was unique to California. By a vote of 5 to 4, the Court reversed the judgment of the state court, concluding—somewhat ironically—that "the

wisdom of the decision to permit juror consideration of possible commutation is best left to the States." *Id.*, at 1014.

In response I asked, as I do again today, "what harm would have been done to the administration of justice by state courts if the [Kansas] court had been left undisturbed in its determination[?]" *Id.*, at 1030. "If it were true that this instruction may make the difference between life and death in a case in which the scales are otherwise evenly balanced, that is a reason why the instruction should not be given—not a reason for giving it." *Ibid.* "No matter how trivial the impact of the instruction may be, it is fundamentally wrong for the presiding judge at the trial—who should personify the evenhanded administration of justice—to tell the jury, indirectly to be sure, that doubt concerning the proper penalty should be resolved in favor of [death]." *Ibid.*

As in *Ramos*, in this case "no rule of law commanded the Court to grant certiorari." *Id.*, at 1031. Furthermore, "[n]o other State would have been required to follow the [Kansas] precedent if it had been permitted to stand. Nothing more than an interest in facilitating the imposition of the death penalty in [Kansas] justified this Court's exercise of its discretion to review the judgment of the [Kansas] Supreme Court." *Ibid.* And "[t]hat interest, in my opinion, is not sufficient to warrant this Court's review of the validity of a jury instruction when the wisdom of giving that instruction is plainly a matter that is best left to the States." *Ibid.**

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*JUSTICE SCALIA takes issue with my approach, suggesting that the federal interests vindicated by our review are equally weighty whether the state court found for the defendant or for the State. *Ante*, at 2–5 (concurring opinion). In so doing, he overlooks the separate federal interest in ensuring that no person be convicted or sentenced in violation of the Federal Constitution—an interest entirely absent when the State is the petitioner. It is appropriate—and certainly impartial, but

We decided *Ramos* on the same day as *Michigan* v. *Long*, 463 U. S. 1032 (1983). Prior to that time, "we had virtually no interest" in criminal cases where States sought to set aside the rulings of their own courts. *Id.*, at 1069 (STEVENS, J., dissenting). Although in recent years the trend has been otherwise, I continue to hope "that a future Court will recognize the error of this allocation of resources," *id.*, at 1070, and return to our older and better practice of restraint.

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see *ante*, at 4–5—to take this difference in federal interests into account in considering whether to grant a petition for writ of certiorari.

JUSTICE SCALIA also fails to explain why there is such an urgent need "to ensure the integrity and uniformity of federal law." *Ante*, at 2. If this perceived need is a "primary basis for the Constitution's allowing us to be accorded jurisdiction to review state-court decisions," *ibid.* (citing Art. III, §2, cls. 1 and 2), then one would think that the First Judiciary Act would have given us jurisdiction to review all decisions based on the Federal Constitution coming out of state courts. But it did not. Unconcerned about JUSTICE SCALIA's "crazy quilt," *ante*, at 4, the First Congress only provided us with jurisdiction over such cases "where [there] is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties or laws of the United States, *and the decision is in favour of such their validity*." Act of Sept. 24, 1789, §25, 1 Stat. 85 (emphasis added). Not until 1914 did we have jurisdiction over decisions from state courts which arguably overprotected federal constitutional rights at the expense of state laws. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790; see also *Delaware* v. *Van Arsdall*, 475 U. S. 673, 694–697 (1986) (STEVENS, J., dissenting). Even then, our review was only by writ of certiorari, whereas until 1988 defendants had a right to *appeal* to us in cases in which state courts had upheld the validity of state statutes challenged on federal constitutional grounds. See 28 U. S. C. §1257 (1982 ed.). In other words, during the entire period between 1789 and 1988, the laws enacted by Congress placed greater weight on the vindication of federal rights than on the interest in the uniformity of federal law.

# SUPREME COURT OF THE UNITED STATES

No. 04–1170

KANSAS, PETITIONER *v.* MICHAEL LEE MARSH, II

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

[June 26, 2006]

JUSTICE SOUTER, with whom JUSTICE STEVENS, JUSTICE GINSBURG, and JUSTICE BREYER join, dissenting.

I

Kansas's capital sentencing statute provides that a defendant "shall be sentenced to death" if, by unanimous vote, "the jury finds beyond a reasonable doubt that one or more aggravating circumstances . . . exist and . . . that the existence of such aggravating circumstances is not outweighed by any mitigating circumstances which are found to exist." Kan. Stat. Ann. §21–4624(e) (1995). The Supreme Court of Kansas has read this provision to require imposition of the death penalty "[i]n the event of equipoise, [that is,] the jury's determination that the balance of any aggravating circumstances and any mitigating circumstances weighed equal." 278 Kan. 520, 534, 102 P. 3d 445, 457 (2004) (case below); see also *State* v. *Kleypas*, 272 Kan. 894, 1016, 40 P. 3d 139, 232 (2001) (stating that the language of §21–4624(e) "provides that in doubtful cases the jury must return a sentence of death"). Given this construction, the state court held the law unconstitutional on the ground that the Eighth Amendment requires that a "'tie g[o] to the defendant' when life or death is at issue." *Ibid.* Because I agree with the Kansas judges that the Constitution forbids a mandatory death penalty in what they describe as "doubtful cases," when aggravating and mitigating factors are of equal weight, I

respectfully dissent.[1]

II

More than 30 years ago, this Court explained that the Eighth Amendment's guarantee against cruel and unusual punishment barred imposition of the death penalty under statutory schemes so inarticulate that sentencing discretion produced wanton and freakish results. See *Furman* v. *Georgia*, 408 U. S. 238, 309–310 (1972) *(per curiam)* (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals). The Constitution was held to require, instead, a system structured to produce reliable, *Woodson* v. *North Carolina*, 428 U. S. 280, 305 (1976) (plurality opinion), rational, *Jurek* v. *Texas*, 428 U. S. 262, 276 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.), and rationally reviewable, *Woodson*, *supra*, at 303, determinations of sentence.

Decades of back-and-forth between legislative experiment and judicial review have made it plain that the constitutional demand for rationality goes beyond the minimal requirement to replace unbounded discretion with a sentencing structure; a State has much leeway in devising such a structure and in selecting the terms for measuring relative culpability, but a system must meet an ultimate test of constitutional reliability in producing "'a

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[1]The majority views *Walton* v. *Arizona*, 497 U. S. 639 (1990), as having decided this issue. But *Walton* is ambiguous on this point; while the Court there approved Arizona's practice of placing the burden on capital defendants to prove, "by a preponderance of the evidence, the existence of mitigating circumstances sufficiently substantial to call for leniency," *id.*, at 649 (plurality opinion), it did not quantify the phrase "sufficiently substantial." Justice Blackmun clearly thought otherwise, see *id.*, at 687 (dissenting opinion), but he cried a greater foul than one can get from the majority opinion. *Stare decisis* does not control this case.

reasoned moral response to the defendant's background, character, and crime,'" *Penry* v. *Lynaugh*, 492 U. S. 302, 319 (1989) (quoting *California* v. *Brown*, 479 U. S. 538, 545 (1987) (O'Connor, J., concurring); emphasis deleted); cf. *Gregg* v. *Georgia*, 428 U. S. 153, 206 (1976) (joint opinion of Stewart, Powell, and STEVENS, JJ.) (sanctioning sentencing procedures that "focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant"). The Eighth Amendment, that is, demands both form and substance, both a system for decision and one geared to produce morally justifiable results.

The State thinks its scheme is beyond questioning, whether as to form or substance, for it sees the tie-breaker law as equivalent to the provisions examined in *Blystone* v. *Pennsylvania*, 494 U. S. 299 (1990), and *Boyde* v. *California*, 494 U. S. 370 (1990), where we approved statutes that required a death sentence upon a jury finding that aggravating circumstances outweighed mitigating ones. But the crucial fact in those systems was the predominance of the aggravators, and our recognition of the moral rationality of a mandatory capital sentence based on that finding is no authority for giving States free rein to select a different conclusion that will dictate death.

Instead, the constitutional demand for a reasoned moral response requires the state statute to satisfy two criteria that speak to the issue before us now, one governing the character of sentencing evidence, and one going to the substantive justification needed for a death sentence. As to the first, there is an obligation in each case to inform the jury's choice of sentence with evidence about the crime as actually committed and about the specific individual who committed it. See *Spaziano* v. *Florida*, 468 U. S. 447, 460, and n. 7 (1984). Since the sentencing choice is, by definition, the attribution of particular culpability to a criminal act and defendant, as distinct from the general

culpability necessarily implicated by committing a given offense, see *Penry, supra,* at 327–328; *Spaziano, supra,* at 460; *Zant* v. *Stephens,* 462 U. S. 862, 879 (1983), the sentencing decision must turn on the uniqueness of the individual defendant and on the details of the crime, to which any resulting choice of death must be "directly" related. *Penry, supra,* at 319.

Second, there is the point to which the particulars of crime and criminal are relevant: within the category of capital crimes, the death penalty must be reserved for "the worst of the worst." See, *e.g., Roper* v. *Simmons,* 543 U. S. 551, 568 (2005) ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution'" (quoting *Atkins* v. *Virginia,* 536 U. S. 304, 319 (2002))). One object of the structured sentencing proceeding required in the aftermath of *Furman* is to eliminate the risk that a death sentence will be imposed in spite of facts calling for a lesser penalty, *Penry, supra,* at 328–329, and the essence of the sentencing authority's responsibility is to determine whether the response to the crime and defendant "must be death," *Spaziano, supra,* at 461; cf. *Gregg, supra,* at 184 (joint opinion of Stewart, Powell, and STEVENS, JJ.). Of course, in the moral world of those who reject capital punishment in principle, a death sentence can never be a moral imperative. The point, however, is that within our legal and moral system, which allows a place for the death penalty, "must be death" does not mean "may be death."

Since a valid capital sentence thus requires a choice based upon unique particulars identifying the crime and its perpetrator as heinous to the point of demanding death even within the class of potentially capital offenses, the State's provision for a tie breaker in favor of death fails on both counts. The dispositive fact under the tie breaker is not the details of the crime or the unique identity of the

individual defendant. The determining fact is not directly linked to a particular crime or particular criminal at all; the law operates merely on a jury's finding of equipoise in the State's own selected considerations for and against death. Nor does the tie breaker identify the worst of the worst, or even purport to reflect any evidentiary showing that death must be the reasoned moral response; it does the opposite. The statute produces a death sentence exactly when a sentencing impasse demonstrates as a matter of law that the jury does not see the evidence as showing the worst sort of crime committed by the worst sort of criminal, in a combination heinous enough to demand death. It operates, that is, when a jury has applied the State's chosen standards of culpability and mitigation and reached nothing more than what the Supreme Court of Kansas calls a "tie," *Kleypas*, 272 Kan., at 1016, 40 P. 3d, at 232 (internal quotation marks omitted). It mandates death in what that court identifies as "doubtful cases," *ibid.* The statute thus addresses the risk of a morally unjustifiable death sentence, not by minimizing it as precedent unmistakably requires, but by guaranteeing that in equipoise cases the risk will be realized, by "placing a 'thumb [on] death's side of the scale,'" *Sochor* v. *Florida*, 504 U. S. 527, 532 (1992) (quoting *Stringer* v. *Black*, 503 U. S. 222, 232 (1992); alteration in original).

In Kansas, when a jury applies the State's own standards of relative culpability and cannot decide that a defendant is among the most culpable, the state law says that equivocal evidence is good enough and the defendant must die. A law that requires execution when the case for aggravation has failed to convince the sentencing jury is morally absurd, and the Court's holding that the Constitution tolerates this moral irrationality defies decades of precedent aimed at eliminating freakish capital sentencing in the United States.

III

That precedent, demanding reasoned moral judgment, developed in response to facts that could not be ignored, the kaleidoscope of life and death verdicts that made no sense in fact or morality in the random sentencing before *Furman* was decided in 1972. See 408 U. S., at 309–310 (Stewart, J., concurring). Today, a new body of fact must be accounted for in deciding what, in practical terms, the Eighth Amendment guarantees should tolerate, for the period starting in 1989 has seen repeated exonerations of convicts under death sentences, in numbers never imagined before the development of DNA tests. We cannot face up to these facts and still hold that the guarantee of morally justifiable sentencing is hollow enough to allow maximizing death sentences, by requiring them when juries fail to find the worst degree of culpability: when, by a State's own standards and a State's own characterization, the case for death is "doubtful."

A few numbers from a growing literature will give a sense of the reality that must be addressed. When the Governor of Illinois imposed a moratorium on executions in 2000, 13 prisoners under death sentences had been released since 1977 after a number of them were shown to be innocent, as described in a report which used their examples to illustrate a theme common to all 13, of "relatively little solid evidence connecting the charged defendants to the crimes." State of Illinois, G. Ryan, Governor, Report of the Governor's Commission on Capital Punishment: Recommendations Only 7 (Apr. 2002) (hereinafter Report); see also *id.*, at 5–6, 7–9. During the same period, 12 condemned convicts had been executed. Subsequently the Governor determined that 4 more death row inmates were innocent. See *id.*, at 5–6; Warden, Illinois Death Penalty Reform, 95 J. Crim. L. & C. 381, 382, and n. 6

(2005).[2] Illinois had thus wrongly convicted and condemned even more capital defendants than it had executed, but it may well not have been otherwise unique; one recent study reports that between 1989 and 2003, 74 American prisoners condemned to death were exonerated, Gross, Jacoby, Matheson, Montgomery, & Patil, Exonerations in the United States 1989 Through 2003, 95 J. Crim. L. & C. 523, 531 (2006) (hereinafter Gross), many of them

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[2]The Illinois Report emphasizes the difference between exoneration of a convict because of actual innocence, and reversal of a judgment because of legal error affecting conviction or sentence but not inconsistent with guilt in fact. See Report 9 (noting that, apart from the 13 released men, a "broader review" discloses that more than half of the State's death penalty cases "were reversed at some point in the process"). More importantly, it takes only a cursory reading of the Report to recognize that it describes men released who were demonstrably innocent or convicted on grossly unreliable evidence. Of one, the Report notes "two other persons were subsequently convicted in Wisconsin of" the murders. *Id.*, at 8. Of two others, the Report states that they were released after "DNA tests revealed that none of them were the source of the semen found in the victim. That same year, two other men confessed to the crime, pleaded guilty and were sentenced to life in prison, and a third was tried and convicted for the crime." *Ibid.* Of yet another, the Report says that "another man subsequently confessed to the crime for which [the released man] was convicted. He entered a plea of guilty and is currently serving a prison term for that crime." *Id.*, at 9.

A number were subject to judgments as close to innocence as any judgments courts normally render. In the case of one of the released men, the Supreme Court of Illinois found the evidence insufficient to support his conviction. See *People* v. *Smith*, 185 Ill. 2d 532, 708 N. E. 2d 365 (1999). Several others obtained acquittals, and still more simply had the charges against them dropped, after receiving orders for new trials.

At least 2 of the 13 were released at the initiative of the executive. We can reasonably assume that a State under no obligation to do so would not release into the public a person against whom it had a valid conviction and sentence unless it were certain beyond all doubt that the person in custody was not the perpetrator of the crime. The reason that the State would forgo even a judicial forum in which defendants would demonstrate grounds for vacating their convictions is a matter of common sense: evidence going to innocence was conclusive.

cleared by DNA evidence, *ibid.*[3] Another report states that "more than 110" death row prisoners have been released since 1973 upon findings that they were innocent of the crimes charged, and "[h]undreds of additional wrongful convictions in potentially capital cases have been documented over the past century." Lanier & Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 Psychology, Public Policy & Law 577, 593 (2004). Most of these wrongful convictions and sentences resulted from eyewitness misidentification, false confession, and (most frequently) perjury, Gross 544, 551–552, and the total shows that among all prosecutions homicide cases suffer an unusually high incidence of false conviction, *id.*, at 532, 552, probably owing to the combined difficulty of investigating without help from the victim, intense pressure to get convictions in homicide cases, and the corresponding incentive for the guilty to frame the

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[3] The authors state the criteria for their study: "As we use the term, 'exoneration' is an official act declaring a defendant not guilty of a crime for which he or she had previously been convicted. The exonerations we have studied occurred in four ways: (1) In forty-two cases governors (or other appropriate executive officers) issued pardons based on evidence of the defendants' innocence. (2) In 263 cases criminal charges were dismissed by courts after new evidence of innocence emerged, such as DNA. (3) In thirty-one cases the defendants were acquitted at a retrial on the basis of evidence that they had no role in the crimes for which they were originally convicted. (4) In four cases, states posthumously acknowledged the innocence of defendants who had already died in prison . . . ." Gross 524 (footnote omitted). The authors exclude from their list of exonerations "any case in which a dismissal or an acquittal appears to have been based on a decision that while the defendant was not guilty of the charges in the original conviction, he did play a role in the crime and may be guilty of some lesser crime that is based on the same conduct. For our purposes, a defendant who is acquitted of murder on retrial, but convicted of involuntary manslaughter, has not been exonerated. We have also excluded any case in which a dismissal was entered in the absence of strong evidence of factual innocence, or in which—despite such evidence—there was unexplained physical evidence of the defendant's guilt." *Ibid.*, n. 4.

innocent, *id.*, at 532.

We are thus in a period of new empirical argument about how "death is different," *Gregg*, 428 U. S., at 188 (joint opinion of Stewart, Powell, and STEVENS, JJ.): not only would these false verdicts defy correction after the fatal moment, the Illinois experience shows them to be remarkable in number, and they are probably disproportionately high in capital cases. While it is far too soon for any generalization about the soundness of capital sentencing across the country, the cautionary lesson of recent experience addresses the tie-breaking potential of the Kansas statute: the same risks of falsity that infect proof of guilt raise questions about sentences, when the circumstances of the crime are aggravating factors and bear on predictions of future dangerousness.

In the face of evidence of the hazards of capital prosecution, maintaining a sentencing system mandating death when the sentencer finds the evidence pro and con to be in equipoise is obtuse by any moral or social measure. And unless application of the Eighth Amendment no longer calls for reasoned moral judgment in substance as well as form, the Kansas law is unconstitutional.